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Arjan Singh Hira Singh Matharu v Italian Construction Co Ltd and another [1964] 1 EA 1 (HCT)

Division: High Court of Tanganyika at Dar-es-Salaam

Date of judgment: 24 December 1963

Case Number: 87/1963

Before: Spry J

Sourced by: LawAfrica

[1] Practice – Complaint – Amendment – Limitation – Cause of action against partners of firm – Firm incorporated as limited company after cause of action arose – Suit erroneously filed against limited company – Application to substitute firm as defendant.

Editor's Summary

The plaintiff was concerned in a traffic accident which also involved a vehicle then belonging to a firm known as Italian Construction Co. After the accident a limited company was incorporated called Italian Construction Co. Ltd. of which the partners of the firm were directors and shareholders. When the plaintiff's advocate prepared and filed a plaint for his client he showed the defendant company instead of the firm as a defendant, although the company was not in existence at the time of the accident. Subsequently an application was made for leave to amend the plaint by substituting the firm for the defendant company in support of which it was submitted that on the wording of the plaint it was clear that it was the firm which it was really intended to sue.

Held – upon a fair reading of the plaint it was the plaintiff's intention to sue the persons who were the partners in the firm at the material date; further since those partners, as directors of the limited company, had notice of the suit within the period of limitation it was just and proper to grant the application for amendment of the plaint.

Application granted.

Cases referred to in judgment:

(1) *Saraspur Manufacturing Co. Ltd. v. B. B. & C. I. Ry. Co.*, [1923] Bom. 785.

(2) *Radha Lal v. E. I. Ry. Co. Ltd.*, [1925] Pat. 128.

Judgment

Spry J: This is an application for leave to amend a plaint, by substituting the name of a firm for the name of a limited company

as the first defendant. The application is expressed to be made under Order 1, r. 10, and Order 6, r. 17, of the Indian Code of Civil Procedure, 1908, as applied to Tanganyika.

The proceedings arose out of a traffic accident which occurred on September 12, 1962, and it is alleged that the vehicle involved belonged at the material time to a firm known as "Italian Construction Co." On December 4, 1962, a limited company was incorporated under the name "Italian Construction Co. Ltd.", with the partners of the firm as the directors and share-holders. The plaint was drawn showing the limited company as the first defendant, instead of the firm, although the limited company was, of course, not in existence at the time when the cause of action arose.

It appears that the advocate who drew the plaint, acting in some haste as the period of limitation was running out, regarded the limited company as the same person as the firm; he treated the incorporation of the company as if it were a mere change of name and inserted in the plaint what he regarded as the then correct description of the body he intended to sue. This was, of course, entirely misconceived, as the limited company is in law a separate person.

The importance of the present application is this, that if it is necessary for the name of the firm to be substituted for that of the company, on the basis that the company was a person improperly joined, s. 22 of the Indian Limitation Act, 1908, as applied to Tanganyika will come into operation and the suit, as against the first defendant, will be barred by limitation. If, on the other hand, leave is given to amend the plaint to correct a mere misdescription, the question of limitation does not arise.

Counsel for the plaintiff-applicant, based his argument on the wording of the plaint, which, he submits, in cl. 2, cl. 4, cl. 7 and the letter thereto annexed, clearly shows that the plaintiff intended to sue the firm. There was never, he submits, any intention to allege liability on the part of the company.

Counsel for the plaintiff-applicant referred me to various passages in Rustomji's Law of Limitation and Chitaley's Indian Limitation Act (1908). I have read those references and also the cases on which the learned authors base their opinions. As is not unusual, there is some conflict of authorities but it seems clear that the general tendency of the courts has been a liberal one of exercising the powers conferred by Order 6, r. 17, when satisfied first, that there was no real intention of suing the person wrongly named in the plaint and, secondly, that the person intended to be sued has had notice of the proceedings within the period of limitation. I do not propose to cite all the authorities but will confine myself to two.

In *Saraspur Manufacturing Co. Ltd. v. B. B. & C. I. Ry. Co.* (1), MacLeod, C.J., said:

"It seems to me in the interests of justice that if it can be said that there has been a misdescription of a party in the title of a plaint the necessary amendment ought to be allowed, if otherwise the rights of the parties would be prejudiced. If the defendant company could be considered as having had no notice that these suits had been brought against it by the plaintiffs, then undoubtedly limitation would be considered as running up to the date when the defendant company had notice of the claims by being made a party to the suits."

Again, in *Radha Lal v. E. I. Ry. Co. Ltd.* (2), a case in which the agent of a railway company had been sued instead of the company itself, Mullick, Ag.C.J., said:

"If the plaintiff deliberately chooses to sue not the company but the agent he cannot by any decree which he obtains in the suit bind the company."

If, however, upon a fair reading of the plaint it is made out that the description of the defendant is a mere error and that the company is the real defendant then the suit may proceed against the company.”

Neither of those cases was exactly on all fours with the present case, but I think the principles emerge clearly. Applying them to the present case, I am satisfied that “upon a fair reading of the plaint” the intention was to sue the persons who were partners in the firm at the material date. I am satisfied also that those partners, as the directors of the limited company, had notice of the suit within the period of limitation. I consider it just and proper, therefore, to allow this application under the powers conferred by Order 6, r. 17, and I so order.

As this application arose out of an act of professional negligence, I direct that the costs of the application be borne personally by the advocate who drew the plaint.

Application granted.

For the plaintiff-applicant:

P. R. Dastur, Dar-es-Salaam

For the defendant-respondent:

Atkinson & Walker, Dar-es-Salaam

M. D. Riegels

Kurji Anandji & Co v Sojpal Punja Shah and others [1964] 1 EA 3 (CAK)

Division:	Court of Appeal at Kampala
Date of judgment:	16 January 1964
Case Number:	68/1963
Before:	Sir Ronald Sinclair P, Crawshaw and Newbold JJA
Sourced by:	LawAfrica
Appeal from:	The High Court of Uganda – Keatinge, J.

[1] Bill of exchange – Renewal – Dishonour – Revival of original bill – Promissory notes given to creditor in satisfaction of debt – Promissory notes dishonoured – Series of new notes given as conditional payment – First two new notes dishonoured – Action brought on original notes – Right to sue on original notes.

Editor’s Summary

In satisfaction of a debt the appellants gave the respondents four promissory notes to the value of Shs. 34,386/94. Each of the original notes when duly presented for payment was dishonoured. After dishonour

of the last note the respondents agreed to give the appellants further time for payment and the appellants gave to the respondents eleven new promissory notes each for Shs. 3,000/-, the first being payable after thirty days, and the remainder seriatim at intervals of thirty days. After the first two of the new notes had been dishonoured the respondents filed a suit on the original notes to which the defence was that the respondents were not entitled to sue on the original notes until all the new notes had been dishonoured. After filing proceedings the respondents presented for payment the third of the new notes which was also dishonoured. The judge found for the respondents, holding that the appellants' failure to meet the first two of the new promissory notes indicated that the appellants did not intend to fulfil their part of the contract and this amounted to renunciation; that the respondents had elected to accept the appellants' renunciation and that presentation of the third new promissory note did not alter the situation. On appeal,

Held –

- (i) by allowing all the original notes to be dishonoured followed by the dishonour of the first two of the new notes the appellants had evinced an intention

not to be bound by the contract and this amounted to renunciation; accordingly the respondents were entitled to elect to treat the agreement as repudiated;

- (ii) the condition on which the new notes were accepted was such that a right of action on the original notes revived immediately upon the dishonour of any of the new notes.

Appeal dismissed.

Cases referred to in judgment

- (1) *Barber v. Mackrell* (1893), 68 L.T. 29.
- (2) *Van der Westhuizen v. Lochner* (1908), 18 Cape Times 446.
- (3) *Maple Flock Co. Ltd. v. Universal Furniture Products (Wembley) Ltd.*, [1934] 1 K.B. 148.
- (4) *Millar's Karri & Jarrah Co. v. Weddel, Turner & Co.* (1909), 100 L.T. 128.
- (5) *Goldshede v. Cottrell* (1837), 6 L.J. (N.S.) Ex. 26; (1836), 2 M. & W. 20; 150 E.R. 651.
- (6) *Sibree v. Tripp* (1846), 153 E.R. 745; 15 L.J. Ex. 318; 15 M. & W. 23.
- (7) *Peytoe's Case* (1612), 77 E.R. 847.
- (8) *British Russian Gazette & Trade Outlook Ltd. v. Associated Newspapers Ltd.*, [1933] 2 K.B. 616.
- (9) *Day v. McLea* (1889), 22 Q.B.D. 160.
- (10) *Neuchatel Asphalte Co. Ltd. v. Barnett*, [1957] 1 All E.R. 362.

Judgment

The following judgments were read: **Crawshaw JA:** The High Court of Uganda gave judgment for the respondents (original plaintiffs) in a sum of Shs. 34, 386/94 with interest and costs, and against that judgment the appellants (original defendants) appeal.

The respondents' claim was on four promissory notes (hereinafter referred to as "the original notes") drawn by the appellants in favour of the respondents in October, 1961, which were dishonoured when duly presented for payment. After the last note had been dishonoured the respondents agreed to give the appellants further time for payment, and the appellants, on March 10, 1962, gave to the respondents eleven new promissory notes (hereinafter referred to as "the new notes") each for Shs. 3,000/-, the first being payable after thirty days, and the remainder seriatim at further intervals of thirty days, the last being payable after 330 days. After the first two of the new notes had been dishonoured the respondents filed the suit on the original notes. The plaint made no mention of the new notes, but in their written statement of defence the appellants denied liability on the original notes and said:

- "2. That the plaint is bad in law.
- 3. That the plaintiffs on or about March 10, 1962, that is after the maturity of the bills sued on, released the defendants by giving time to the acceptor in pursuance of binding agreement in consideration of one Manilal Manji Kanabar endorsing the fresh promissory notes which were given and accepted by the plaintiffs as under, as new securities, against all the four bills annexed to the plaint."

Particulars of the new notes were then set out and the paragraph continued:

“That as part performance of fresh binding agreement the fresh promissory notes when due were presented for payment as well through a bank.”

The respondents filed no reply to the defence. After the filing of the suit the respondents presented for payment the third of the new notes; it also was

dishonoured. At the hearing no evidence was called, but the facts I have already set out were agreed, and after hearing argument, the learned judge gave what he described as a “ruling” on whether the respondents could in law sue on the original notes and in pursuance of that ruling he gave judgment; he said:

“In my opinion the defendant’s failure to meet the first two of the fresh promissory notes showed clearly that he did not intend to fulfil his part of the contract and this amounted to renunciation. Mr. Patel [counsel for the appellants] has argued that there is no evidence that plaintiff ever elected to accept the renunciation particularly as the third promissory note was presented after this action was filed. I consider plaintiff’s conduct in filing this suit provides ample evidence that he accepted defendant’s renunciation and in my view the presentation of the third promissory note did not alter this situation. Thus in my judgment the submission made on behalf of defendant fails.

As the parties have agreed that judgment will follow the ruling on the above issue, judgment will be entered for the plaintiff as prayed.”

We do not know, and it has not been suggested that it is material, whether the original notes were taken in complete satisfaction of the original debt or as a conditional payment. We are informed, however, by counsel for the appellants, that the new notes were not taken in complete satisfaction of the original notes, but were a conditional payment only. This would appear to be consistent with the view he took in the lower court where he is recorded as saying, “Original liability is not renewed till all eleven p/notes were dishonoured”. That such was the arrangement may seem a little surprising in view of the nature of the transaction as a whole, but on the other hand it is of significance that the respondents retained possession of the original notes on issue of the new notes. Whether it was a complete or conditional payment is a question of fact dependent on the intention of the parties, and it is not apparently in dispute that the intention was that the new notes should be a conditional payment only. Had the new notes been in complete satisfaction of the original notes the latter could not, of course, have been sued on. It is to be observed that the new notes were for a rather lesser amount than the original (the reason for which does not appear in the record), but no point has been made of this.

The position on renewal of notes is concisely set out in *Chalmers on Bills of Exchange* (12th Edn.), where, at p. 210, it is said:

“When a bill is given in renewal of a former bill, and the holder retains such former bill, the renewal, in the absence of special agreement, operates merely as a conditional payment thereof. If the renewal bill be paid in due course or otherwise discharged, the original bill is likewise discharged; but if the renewal bill be dishonoured, then, subject to the preceding rule as to principal and surety, the liabilities of the parties to the original bill revive, and they may be sued thereon.

Renewing a bill or note operates as an extension of the time for paying it . . . A bill given in renewal of another bill operates in the same way as a bill given in respect of any other debt. The ordinary effect of giving a bill is that the remedy for the debt is suspended until dishonour of the bill. The bill operates as conditional payment, the condition being that the debt revives if the bill cannot be realised. It is immaterial whether the bill be payable on demand or *in futuro*.”

In *Barber v. Mackrell* (1) Lindley, L.J. said:

“A bill is renewed when another bill is taken in its place, the parties to the bill and amount of it being the same, though perhaps in some cases the interest due on the first bill is added.”

Whether or not in the instant case the new bills can strictly be described as having been given by way of renewal, it was submitted by counsel for the respondents that the same principles apply. Counsel for the appellants did not question this, and I see no reason to think otherwise, though “conditional substitution” might be a more appropriate expression in the present circumstances than “conditional renewal”.

Counsel for the respondents has submitted that by dishonouring the two new notes the appellants showed that they did not intend to carry out the new terms, and that this amounted to a renunciation of the conditional agreement. The respondents thereupon became entitled to treat it as repudiated and to sue on the full amount of the original notes, and this is what they elected to do. Counsel for the appellants has submitted that a right of action on the original notes did not arise until all the new notes had been dishonoured, as each new note dishonoured gave rise to a single and separate cause of action on that note alone in the absence of agreement that on default on one note the full amount became immediately payable. Whether, omitting reference to the original notes, that would be the position on the new notes, counsel for the respondent seemed uncertain, and neither counsel was able to cite any authority thereon. It seems to me, however, that in the absence of a special default agreement that must be the contractual basis. On the analogy of a debt payable by instalments, a default proviso is common in court orders relating to payment by instalments where statutory provisions do not make such a clause unnecessary. Examples of such statutory provisions are to be found in England in the County Courts Act, 1934 and the Magistrates Courts Act, 1952. Section 9(1) of the Uganda Bills of Exchange Ordinance (Cap. 217) refers to a bill being required to be paid *inter alia* “(b) by instalments; (c) by stated instalments with a provision that upon default in payment of any instalment the whole shall become due”; there would be no need for these provisions if a default clause was otherwise implied. In *Byles on Bills* (21st Edn.), p. 7, a South African case is referred to in note (q) (*Van der Westhuizen v. Lochner* (2)) in the following terms,

“Unless the note specially so provides, the failure to pay an instalment does not authorise the holder to sue for the whole of the balance.”

I am not aware of the law in South Africa, but the proposition is presumably one which the editor of *Byles* thinks applicable to the English law. It is a matter of the intention of the parties. So where there are, as in the instant case, a number of bills, without special provision as to default, there would, in my opinion, be no liability on a bill not yet due merely because of non-payment of an earlier bill, even if the bills can be regarded as making up one single complete debt.

Counsel for the respondents, however, as I understood him, drew a distinction in the instant case by saying that the question is not what was the right of the respondents in respect of the new notes not yet due following default in payment of a new note which had become due, but what right, if any, such default would give the respondents in respect of the original notes. In the lower court counsel for the respondents (not the same counsel as now appears) in making submissions similar to the present counsel for the respondents referred (as has the present counsel) to *Chitty on Contracts* (21st Edn.), where, after it is said that a definite refusal to perform a contract amounts to renunciation, para. 453 continues:

“453. *Renunciation in course of performance.* – The law is similar in cases where a party renounces a contract in the course of its performance, as, for instance, where the subject-matter is a sale of goods to be delivered by instalments. Thus, where a purchaser, after accepting some, refuses to

take any more of the goods concerned, the vendor may sue him for damages at once without manufacturing and tendering the remainder.”

Reference was also made to para. 448 in which it is said:

“He may either treat the renunciation as a breach and sue for damages forthwith or he may wait until the time for performance arrives and then sue.”

It would seem that it was these passages on which the learned judge relied in coming to his conclusions. The passages occur also in Chitty on Contracts (22nd Edn.), Vol. I, which was not available at the hearing of the appeal. There, in para. 1250, it is said:

“But not every refusal to perform some part of a contract will amount to a renunciation of the entire agreement. The contract may be divisible, and in such a case the refusal to perform must be as to something which lies at the root of the contract, or, as it has been said, it must destroy the ‘business efficacy’ of the transaction . . . it is a question in each case depending on the terms of the contract and the circumstances of the case, whether the breach of contract is a repudiation of the whole contract, or whether it is a severable breach giving rise to a claim for compensation, but not to a right to treat the whole contract as repudiated.”

The last part of this quotation is taken from s. 31(2) of the English Sale of Goods Act, 1893, similar to s. 32(2) of the Uganda Sale of Goods Ordinance (Cap. 214), in respect of which section counsel for the respondents cited the case of *Maple Flock Co. Ltd. v. Universal Furniture Products (Wembley) Ltd.* (3), where it was held in an instalment contract that the defendant’s refusal of further deliveries was a breach by it of the contract. The court said that in applying the subsection to a particular case, the main tests to be considered are, first, the quantitative ratio which the breach bears to the contract as a whole, and, secondly, the degree of probability that such a breach will be repeated.

Counsel for the respondents informed us that he had no authority to cover the instant circumstances, but submitted that the same principles applied as under the Sale of Goods Ordinance, and in particular that they were applicable to s. 39 of the Indian Contract Act, which Act was applied to Uganda by Cap. 207 of the Uganda Laws and which, omitting the illustrations, reads:

“39. When a party to a contract has refused to perform, or disabled himself from performing, his promise in its entirety, the promisee may put an end to the contract, unless he has signified, by words or conduct, his acquiescence in its continuance.”

In Pollock and Mulla on the Indian Contract Act (8th Edn.), at p. 295 in the commentary to s. 39, is it said in relation to delivery of goods by instalments:

“Later English authorities have in fact established that mere failure to make one of a series of payments will not generally, in the absence of a prospective refusal, discharge the other party from proceeding with the contract.”

That is a correct comment on the authorities (see, for instance, *Millar’s Karri & Jarrah Co. (1902) v. Weddel, Turner & Co.* (4), but in the instant case there was the dishonouring of all the original notes followed by the dishonouring of the first two of the new notes; in fact no note had at any time been paid. This was cogent evidence on which the learned judge could come to a finding that the appellants, by their conduct, had evinced an intention not to be bound by the

contract. The question is not, I think, whether the learned judge was justified in coming to the conclusion he did on the principles he applied (and I do not think it has been seriously suggested he was not so justified), but whether he applied the right principles. In other words whether the new notes were so unrelated contractually as not to be affected by the doctrine of renunciation, and to give rise to damages only as and when, and to the value, they fell due and were defaulted on.

The only authority I have been able to find in which circumstances existed very similar to the instant case is *Goldshede v. Cottrell* (5). The headnote reads as follows (6 L.J. Ex. 26):

“In an action on a promissory note for £420, the defendant pleaded, that the plaintiff received two bills of exchange of £210 each, to take up and in lieu of the said note, and that the said two bills were not due at the commencement of the suit. The plaintiff negatived the receipt on those terms, and also replied, that one of the bills was due at the commencement of the suit. The defendant put in evidence a memorandum by the plaintiff that the defendant had given him two bills for £210 to take up a bill for £420 overdue. It appeared, however, that the plaintiff retained the latter, and that one of the bills was overdue when the action was commenced: – Held, that it was a question for the jury, whether the bills were received in substitution of the note, or merely in suspension of the right of action; and the jury having given a verdict for the plaintiff, the judge not having been asked to leave that question to them, the court refused to disturb it. Held also, that the defendant was bound to prove the allegation in his plea, that both bills were not due at the commencement of the suit.”

Of the findings of the trial judge the report says:

“The learned judge, however, considered that the plaintiff’s right of action had only been suspended, and that, as one of the bills was dishonoured, he was remitted to his claim on the note, and the plaintiff recovered a verdict for £442 for principal and interest, the defendant having liberty to move to enter a nonsuit, or to reduce the verdict by the amount of the second note.”

The court was moved accordingly. It did not interfere with the finding that there had been no complete discharge of the original note, and as to the remainder of the defendant’s plea the judgment is reported in the following terms:

“It was also incumbent upon the defendant to prove the second part of his plea, namely, that both bills were not due and payable at the commencement of the suit, which was put in issue by the replication. They were about to grant a rule to reduce the damages, but it being admitted that the second bill had been dishonoured since the action was brought, they refused to grant any rule.”

It will be observed that the facts are virtually on all fours with those in the instant case.

The *Goldshede* case (5) is also reported in 150 E.R. 651 though the method of reporting varies considerably from that in the Law Journal. According to the headnote in each it was held that to be a defence to the action on the original note, the defendant would have had to prove that both the new bills were outstanding at the commencement of the action, but the English Report does not indicate the view of the court as to the amount which could have been recovered in a suit on the original note had one of the new notes been outstanding at the time of judgment and the other dishonoured. The case is cited in a number of text books on bills of exchange and contract, but not so far as I can find with

reference to this latter point. We are left therefore with the bare statement in the Law Journal report that the damages would have been reduced, presumably to the amount of the one dishonoured bill.

Sibree v. Tripp (6), is a case where a suit was settled by the defendant giving to the plaintiff three promissory notes maturing at successive intervals; the first two were met, but not the third. Incidentally, it was there held by the appellate court that the acceptance of a negotiable security may be in law a satisfaction of a debt of a greater amount. On the question whether the notes were in complete satisfaction of the original claim or whether the plaintiff reserved to himself the right, in case the notes were not paid when due, of suing on the original consideration, Pollock, C.B., said (153 E.R. at p. 749):

“The words of the agreement seem to import, that, on the giving of the notes, the plaintiff was to look to them as constituting his remedy, and the defendant to them as constituting his liability. If it were otherwise, then, on the slightest laches as to one of the notes, though all the others were paid when due, and that one the day after, the whole arrangement would be void. On this point, therefore, as a matter of evidence, I am of opinion that the plea was proved.”

This again recognises a right, on a conditional payment, to sue when one of several notes is dishonoured, and goes so far as to say, “the whole arrangement would be void”. Whatever in the *Goldshede* case (5) would have been the basis for reducing damages I do not think there is anything in that case which militates against the application to negotiable instruments of the general principles relating to repudiation of a divisible contract. In respect of divisible contracts Chitty (22nd Edn.), says in para. 1266:

“... the failure to perform must defeat the whole object of the contract so as to amount to a complete repudiation by the party in default of his obligations under it.”

In sale of goods to be delivered by instalments the question would be whether default in delivery or payments, as the case may be, was so substantial or of such a nature as to entitle the innocent party to conclude that the other party no longer intended to be bound by the provisions of the contract. In the instant case, the condition was that a series of promissory notes should be paid as they fell due. The default on the first two notes followed default on the original four notes, and the respondents were entitled to consider the conduct of the appellants throughout the whole transaction in coming to the conclusion that it amounted to a renunciation of the conditional agreement. As I have indicated, I think the learned judge was right in holding on the principles which he applied, that they were entitled to come to that conclusion and to elect to treat the agreement as repudiated. In my opinion, however, but without having heard argument thereon, the nature of the condition on which the new notes were accepted was such that a right of action on the original notes would automatically revive immediately there was a breach of that condition, and that such is the ratio decidendi in the *Goldshede* case (5) and the dictum in the *Sibtree* (6) case.

The appellants complain, however, that repudiation (so far as that doctrine applies) was not pleaded, and that presentment for payment of the third of the new notes after suit filed in fact showed a positive acquiescence in the breach, and that it was not therefore open to the respondents to say that at the time the suit was filed they had elected to treat the contract as discharged by virtue of its renunciation by the appellants. Counsel for the appellants has argued that not only was repudiation not pleaded, but that it was not one of the agreed facts, nor was there evidence thereof. The evidence was, of course, the agreed fact that the notes had been dishonoured, and this the judge held to be sufficient.

The question is whether the judge was entitled to find that the respondent's conduct in filing his suit on the original notes was in itself evidence that he had elected to treat the agreement on the new notes as repudiated. The judge held that the presentation of the third new note did not affect the position. If there had been an election at the time of the filing of the suit I think the learned judge was right, for the respondents would have been bound by their election.

As to the plaintiff, the original notes were themselves prima facie evidence of the sums due thereon, and it was for the appellants to raise in defence the new notes upon which they relied. In Bullen & Leake's Precedents of Pleadings (11th Edn.), at p. 764, form 621 is a defence that after the accruing of the plaintiff's claim the defendant delivered to the plaintiff for and on account of the said claim a bill of exchange, not then due. Form 622 is a reply to that defence and is in the following terms:

"Before action, and when the bill referred to in the defence became due, it was duly presented for payment to the said J.K., and was dishonoured, whereof the defendant had due notice, but did not pay the said bill, and the plaintiff at the commencement of this action held, and still holds, the said bill unpaid and unsatisfied."

The *Goldshede v. Cottrell* case (5) is referred to in the sub-note.

Counsel for the appellants referred to the affidavit (which he said he regarded as part of the pleadings) of a partner of the respondent's firm filed in opposition to the appellants' application for leave to defend, and said that there was no mention therein of renunciation or election. What the partner did say was, "of the said new promissory notes three were presented for payment but all were dishonoured whereby there was a failure of consideration entitling me forthwith to proceed with my remedy in respect of the original promissory notes". The third note had not been dishonoured at the time of the filing of the suit, but that does not affect, I think, the meaning of the quotation that the suit was filed because of the failure of consideration. It seems to me that in saying "failure of consideration" the deponent must have meant so substantial a failure as to justify the respondents in treating the agreement as repudiated, in like manner as in instalment contracts failure to make regular payments may give rise to a similar right of election, for the respondents appear to have relied on the revival of the original notes, on which they sued for the full amount. In other words they were exercising the election. It would certainly have been prudent for the respondents to have filed a reply to the written statement of defence, but in the circumstances I do not think it was fatal not to have done so, for the appellants accepted the affidavit as part of the pleadings, and that document, together with the nature of the claim, must have left them in no doubt that the respondents were treating the agreement as repudiated. At the trial counsel for the appellants does not appear to have objected to counsel addressing the court on the question of renunciation, and counsel for the appellants replied thereon, although maintaining his objection on the pleadings.

I would dismiss the appeal with costs.

Sir Ronald Sinclair P: I agree that the appeal should be dismissed with costs.

It was conceded by counsel for the appellants that the eleven new promissory notes were not taken in complete satisfaction of the original notes, but were conditional payment only. The acceptance of the new notes did not, therefore, amount to an accord and satisfaction and the right to sue upon the original notes was suspended only. The question for decision is whether the right to sue upon the original notes revived upon the dishonour of one or more of the new notes or whether that right remained suspended during the currency of all the new notes.

In my view the right to sue upon the original notes revived immediately upon the dishonour of any of the new notes. I do not think that the principles applicable to an instalment contract as exemplified in *Maple Flock Co. Ltd. v. Universal Furniture Products (Wembley) Ltd.* (3), have any application to the circumstances of the present case. In *Goldshede v. Cottrell* (5) the facts were very similar to those in the present case. The case is reported in English Reports and in the Law Journal Reports. The headnote of the report in the English Reports reads:

“To a declaration by the indorsee against the maker of a promissory note for £420, the defendant pleaded, that, after it became due, he gave the plaintiff, and the plaintiff received from him, two bills of exchange for £210 each to take up the note, and in lieu thereof: that the defendant was a party to the bills, and liable thereon to the plaintiff, and that they were not due, and were outstanding in the plaintiff’s hands. The defendant gave in evidence a memorandum, signed by the plaintiff, stating that the defendant had given him two bills for £210 each, to take up the note for £420; and it appeared that one of the bills was overdue and unpaid at the commencement of the action: – Held, that it was a question for the jury whether the bills were given in lieu of and satisfaction for the note, or only to gain time for payment; if the former, it was a defence to the action, although the defendant did not prove the latter allegation of the plea; if the latter, it was no defence, unless he proved that both the bills were outstanding at the commencement of the action.”

In the Law Journal report it is also stated that it was held that it was incumbent upon the defendant to prove that *both* the bills were not due and payable at the commencement of the suit. The judgment of Parke, B., with which Alderson, B. and Gurney, B. concurred, is reported in 150 E.R., at p. 652 as follows:

“The fact of the defendant’s not taking back the note, raised a very strong inference against him. If the bills were given in substitution for it, that was a question for the jury; but the defendant’s counsel did not ask that it should be left to the jury, and I think there can be no doubt, if it had been, that they would have found against him. If the memorandum is to be construed the other way, it reduces the defendant to the latter branch of his plea; then he must show that both the bills were outstanding. That is not proved.”

That decision, in my view, governs the present case and the new notes were no defence to the action on the original notes unless the appellant could prove that none of the new notes was due and payable at the commencement of the action. That, of course, he could not do.

In view of the conclusion to which I have come, I think the cause of action was adequately pleaded.

The appeal is accordingly dismissed with costs.

Newbold JA: This appeal is one more example of the dangers of trying to take a short cut; no evidence was adduced and the agreed facts do not include the fact most relevant to the determination of the real issue between the parties.

The respondent filed a suit against the appellant claiming the sum of Shs. 33,833/20 on four promissory notes which had been dishonoured after presentation. The defence was that the respondent had released the appellant from his liability under the four dishonoured notes by accepting eleven fresh promissory notes payable at intervals of thirty days “as new securities against” the four dishonoured notes sued on. At the trial no evidence was given and we were

informed on the appeal that the sole issue at the trial was whether on certain agreed facts the plaintiff in law could file a suit on the four original promissory notes. The agreed facts were: (1) that the four original promissory notes were dishonoured; (2) that "In order to give defendant further time to pay plaintiff accepted eleven fresh promissory notes of Shs. 3000/- each against the four promissory notes sued on in the plaint"; (3) that on presentation the first two fresh promissory notes were dishonoured; (4) that the plaintiff then filed this action; (5) that after filing action the plaintiff presented the third of the fresh promissory notes for payment.

It was agreed that the ruling of the judge on this issue would result in judgment in favour of the person who succeeded on the issue. The judge decided the issue in favour of the respondent and accordingly judgment was entered in favour of the respondent on the four original promissory notes. From this the appellant appeals on a number of grounds but, in essence, the main ground is that it was not open to the respondent to sue on the four original promissory notes until the last of the eleven promissory notes accepted by the respondent had been dishonoured.

The defence is nothing other than one of accord and satisfaction and from early days it has been clear that where there is an existing liability after breach accord without satisfaction, or with only partial satisfaction, is not a defence (see *Peytoe's case* (7)). There are, however, circumstances in which the accord itself may constitute the satisfaction. In other words, the plaintiff may agree to accept the promise of performance, as opposed to actual performance, in satisfaction of his original claim (see *British Russian Gazette and Trade Outlook Ltd. v. Associated Newspapers, Ltd.* (8) If such be the case then the plaintiff can in no circumstances sue on the original claim and his sole cause of action is on the substituted consideration. It is a question of fact whether the accord was an acceptance of a promise of performance, as opposed to performance, in place of the original claim (see *Day v. McLea* (9) and *Neuchatel Asphalte Co., Ltd. v. Barnett* (10). The agreed facts do not set out this fact which is essential to the determination of the real issue between the parties and were it not for two factors I would consider that justice would demand that the matter be remitted to the High Court for retrial. There are, however, these two factors which, in my view, remove the necessity of such a course, a course which almost invariably is unsatisfactory to all parties. The first of these factors is that the issue which the judge was asked to decide was whether, on the agreed facts, the plaintiff in law could file a suit on the four original promissory notes. The answer to that issue is clearly yes, as accord and satisfaction is a matter of defence, and thus it is for the defendant to prove that there has been accord and satisfaction. The second factor is that it was accepted by counsel for the appellant in the argument before the trial judge and us that the eleven promissory notes placed the original debt in a state of abeyance. In my view this can mean, and mean only, that the eleven promissory notes were not received in satisfaction of the original debt, that is to say, the accord did not accept the promises contained in the notes as satisfaction of the original debt.

As the eleven promissory notes were not accepted in satisfaction of the original debt but merely purchased time for payment it is clear that the moment there is default on any of the eleven promissory notes the appellant becomes liable on the original debt, (see *Goldshede v. Cottrell* (5)). As Alderson, B. said in *Sibree v. Tripp* (6) (153 E.R., at p. 751):

"... by the non-payment of any one of the notes on the very day it became payable, the whole money would become due."

Thus the defence of accord and satisfaction has not been established and the

plaintiff was entitled to succeed on his original claim. For these reasons I agree that this appeal should be dismissed with costs.

For the appellants:

J. B. Patel, Jinja

For the respondents:

Hunter & Grieg, Jinja

A. I. James

Agip Ltd v Revenue Authority
[1964] 1 EA 13 (HCU)

Division:	High Court of Uganda at Kampala
Date of judgment:	16 January 1964
Case Number:	6/1963
Before:	Bennett J
Sourced by:	LawAfrica

[1] Stamp duty – Adjudication – Premium – Grant of right of way – Indenture providing for payment of premium and annual rent – Rent for whole term expressed as payable in advance – Whether rent payable in advance constitutes a premium.

Editor’s Summary

By an indenture the appellant company granted a right of way to another company over certain land for 46 years in consideration of a premium of Shs. 700/- and an annual rent of Shs. 50/-. The indenture provided that the rent for the whole term amounting to Shs. 2300/- and the premium should be paid in advance and the Revenue Authority, considering that the rent reserved was in the nature of a premium or money advanced, assessed stamp duty at Shs. 60/- under Item 32 (b) of the Schedule to the Stamps Ordinance. On appeal by way of case stated from the decision of the Revenue Authority it was contended that the stamp duty should be Shs. 17/- under Item 32 (c) which provides for the stamp duty payable on a lease where the lease is granted for a fine or premium or for money advanced in addition to rent reserved.

Held – the payment of Shs. 2300/- was in substance and in fact a premium and not a payment of rent in advance and accordingly the indenture was liable to stamp duty under Item 32 (b) of the Schedule to the Stamp Ordinance.

Appeal dismissed.

Cases referred to in judgment:

- (1) *Reference under s. 46 of the Indian Stamp Act 1879* (1884), 7 Mad. 203.
- (2) *Samuel v. Salmon & Gluckstein*, [1946] Ch. 8.
- (3) *Limmer Asphalt Co. Ltd. v. Comrs.* (1872), L.R. 7 Ex. 211.

Judgment

Bennett J: This is an appeal under s. 61 of the Stamps Ordinance, (Cap. 193) by way of case stated from a decision of the Revenue Authority. By an indenture dated June 21, 1962, the appellant, a limited company, granted a right of way (described in the indenture as a “way leave”) and the right to construct and maintain a railway siding, to another limited company over certain lands in Mbale Township for a term of 46 years from April 1, 1962. The consideration for the grant is expressed in clause 5 of the indenture as follows:

“In consideration of the said grant the grantee shall pay to the grantor a premium of Shs. 700/- and an annual rental of Shs. 50/- such rental for the term of 46 years amounting to the sum of Shs. 2300/- and the said premium having been paid to the grantor in advance on the execution of these presents as the grantor hereby acknowledges.”

A right of way is an easement, and s. 2 of the Stamps Ordinance provides that the expression “lease” includes “a grant for a term of the right to use and enjoy any easement . . .” The stamp duty payable on the indenture, therefore, falls to be assessed under Item 32 of the Schedule to the Ordinance which is concerned with the stamp duty payable upon leases.

The Revenue Authority, being of the opinion that the rent reserved by the indenture was in the nature of a premium or “money advanced”, held that the document fell within Item 32 (b) which reads:

“Where the lease is granted for a fine or premium or for money advanced and where no rent is reserved.”

Duty was accordingly assessed at Shs. 60/-.

The appellant contends that the document falls within Item 32 (c), which reads:

“Where the lease is granted for a fine or premium or for money advanced in addition to rent reserved.”

On this footing it is contended that the document should bear stamp duty of Shs. 17/- only.

The question upon which the decision of the court is sought is whether or not the indenture has reserved a rent within the meaning of Item 32 of the Schedule to the Ordinance, and thus whether the document falls to be assessed under sub-para. (b) or sub-para. (c) of Item 32.

Sub-para. (b) and sub-para. (c) of Item 32 in the Schedule to the Stamps Ordinance of Uganda is in terms identical with sub-para. (b) and sub-para. (c) of Art. 35 in the Schedule to the Indian Stamp Act, 1899. Counsel for the appellant contended that the court should consider only the terms of the document itself, and that the fact that in the instant case the whole of the rent was payable in advance did not make it a premium. He relied upon the following passage from Desai on the Indian Stamp Act, 1899 (2nd Edn.), at p. 260:

“Rent distinguished from fine or premium. – By a document purporting to be a lease, certain land was leased for four years at a rent of Rs. 15 per annum. Out of the total rent it was stipulated that Rs. 50 should be paid in advance, and that the balance of Rs. 10 at the end of the term. Held, that the stipulation for the payment of Rs. 50 was one for the payment of rent in anticipation, and not for the payment of a premium or fine, within the meaning of art. 39 (c).

“By a document purporting to be a rent agreement, the lessee took a shop for five years, agreeing to pay Rs. 30 per annum as rent, depositing one year’s rent with the lessor, which was to be credited to the rent of the last year of the term. Held, that the deposit of one year’s rent with the lessor was not a fine or premium within the meaning of art. 39 (c) The stipulation amounted to no more than an agreement that the lessee should pay a year’s rent in advance.”

I have read the judgment in reference under s. 46 of the Indian Stamp Act, 1879(1) on which the above passage is based, and find that the learned judges gave no reasons for their decisions. They are therefore of little persuasive authority.

Counsel for the Revenue Authority referred to the definition of “rent” in Jowitt’s Dictionary of English Law on p. 1521, and to the definition in Desai on the Indian Stamp Act, 1899, at p. 260. He submitted that periodicity was an essential characteristic of rent and where, as in the instant case, the whole of the so-called rent was payable in one lump sum on the execution of the deed,

the payment was in fact a premium. He referred to the following definition in Mulla & Pratt on the Indian Stamp Act, 1899, at p. 347:

“*Premium.* – This is the price paid or promised for the lease – s. 105 of the Transfer of Property Act. Premium is none the less premium though described to be at the rate per annum.”

Counsel for the Revenue Authority also relied upon the English decision of *Samuel v. Salmon & Gluckstein* (2). In that case the lease of a shop for 22 years reserved an annual rental of £600 payable quarterly, and also stipulated for the payment of an annual premium of £600. It was held that the premium was part of the rent reserved by the lease, and that the rent payable was in fact and in law not £600 but £1200. This decision was for the purposes of calculating war damage contributions under the War Damage Act, 1943. In his judgment Uthwatt, J., said:

“Parties may freely make their agreement as to the terms on which the use of the land is ceded by one to the other of them and may be leased for a consideration which is not a rent in law or for a consideration which consists of or includes a rent. The parties may write the agreement in such terms as they please and, if so minded, may attach any label they wish to the payments agreed to be made by the lease. But when, all is done, it is for the law to decide on the effect of the document what payments are rent reserved and what not. No label can create a fact: a label may accurately describe a fact or it may misdescribe it, or may help to the solution of a doubtful question of interpretation. What the parties have done – no their description of it – is the determining consideration.”

The facts of that case are the converse of the instant case, but the decision affords a useful illustration of the principle that the courts will not consider themselves bound by the mere form of an instrument, but will look to its substance when considering its legal effect. So far as the law of stamp duties is concerned, the principle is epitomized by Martin, B. in *Limmer Asphalt Co., Ltd. v. Comrs.* (3) as follows (L.R. 7 Exch., at p. 214):

“In order to determine whether any, and if any what, stamp duty is chargeable upon an instrument, the legal rule is that the real and true meaning of the instrument is to be ascertained; that the description of it given in the instrument itself by the parties is immaterial, even although they may have believed that its effect and operation was to create a security (sic) mentioned in the Stamp Act, and they so declare. For instance, if a writing were headed by a recital that the parties had agreed to execute the promissory note thereafter written, yet if in truth the contract set forth was not a promissory note but an agreement of another character, the stamp duty would not be that of a promissory note but of the agreement.”

In the instant case there is a grant for a term of 46 years, and the whole of the “rent” for that period is payable as a lump sum on the execution of the deed by which the grant is made. To describe such a payment as “rent” is a misdescription of the term “rent” as ordinarily understood in law. In my judgment, the payment of Shs. 2,300/–, however labelled, is in substance and in fact a premium and not a payment of rent in advance. I am therefore of the opinion that the indenture is chargeable to a stamp duty under Item 32 (b) of the Schedule.

The appeal is dismissed and the appellant will pay the respondent’s costs.

Appeal dismissed.

For the appellant:

Hunter & Grieg, Kampala

O. J. Keeble

For the respondent:
The Revenue Authority, Uganda
A. Wither

**D T Dobie & Co (U) Ltd v United India Fire & General Insurance Co Ltd &
another**
[1964] 1 EA 16 (HCU)

Division: High Court of Uganda at Kampala
Date of judgment: 27 January 1963
Case Number: 129/1963
Before: Udo Udoma CJ
Sourced by: LawAfrica

[1] Costs – “Bullock” order – Action against principal and alternatively agent – Defence of principal that agent had no authority to contract – Judgment entered by consent against principal with costs – Suit against agent dismissed with costs – Agent’s costs.

Editor’s Summary

The plaintiff company sued the first and the second defendants as principal and agent respectively for the cost of repairs to a motor vehicle and necessary spare parts. The first defendant denied that the second defendant was its agent or had authority to order repairs for the first defendant. The defence of the second defendant claimed that he had the authority of the first defendant and that since he had ordered the repairs as agent for the first defendant, he was not personally liable. At the hearing judgment was entered by consent against the first defendant with costs and the action against the second defendant was dismissed with costs. The plaintiff company submitted that the first defendant should be ordered to pay the costs because the first defendant, by disputing the authority of the second defendant, had induced the plaintiff company to join the second defendant as a party to the suit.

Held – having regard to the state of the pleadings and the conduct of the first defendant in denying the authority of the second defendant and then submitting to judgment without any contest, the costs of the second defendant should be paid by the first defendant.

Order accordingly.

Cases referred to in judgment:

- (1) *Bullock v. London General Omnibus Co. & Others*, [1907] 1 K.B. 264; [1906] All E.R. Rep. 44.
- (2) *Sanderson v. Blyth Theatre Co.*, [1903] 2 K.B. 533.
- (3) *Besterman v. British Motor Cab Co., Ltd.*, [1914] 3 K.B. 181; [1914] All E.R. Rep. 1111.

(4) *Mayer v. Harte & Others*, [1960] 2 All E. R. 840.

Judgment

Udo Udoma CJ: In this case the plaintiff-company by their plaint had claimed against the first and second defendants the sum of Shs. 6,323/30 for work and labour in repairing, at the request of the second defendant as agent for the first defendant company, a motor vehicle No. URY 611, property of the first defendant company and for materials supplied for the purpose of the said repairs.

In paras. 1 to 6 of their plaint filed the plaintiff company had pleaded as follows:

- “1. On or about August 9, 1962 at Kampala the defendant No. 2 representing himself to be the agent of the defendants No. 1 induced the plaintiffs to enter into a contract with him as such agent for the repairs to motor

- vehicle registered No. URY 611 and for the supply of the necessary spare parts to put the said motor vehicle in running order by the plaintiffs for the defendants No. 1, the agreed and/or reasonable cost whereof is Shs. 6,323/30.
2. The plaintiffs have carried out the repairs to the said motor vehicle and supplied the necessary spares at a cost of Shs. 6,323/30 as per particulars annexed hereto and marked '**DTD.**'
 3. By reason of the premises the defendant No. 2 impliedly warranted that he was authorised by the defendants No. 1 to make the said contract as their agent and thereby induced the plaintiffs to enter into the said contract.
 4. The plaintiffs demanded the payment of Shs. 6,323/30 from the defendants No. 1 but they refused to pay the same or any part thereof and repudiated the authority of the defendant No. 2 to make the said contract on their behalf.
 5. If the defendant No. 2 had authority to make the said contract the plaintiffs claim from the defendants No. 1 the said sum of Shs. 6,323/30. If the defendant No. 2 had no such authority and thus committed a breach of the said warranty then the plaintiffs claim the said sum of Shs. 6,323/30 from defendant No. 2.
 6. Demand for payment has been made but both the defendants refuse and/or neglect to pay the said amount of Shs. 6,323/30 or any part thereof."

In answer to these averments the first defendant company also pleaded in paras. 1 to 3 of their statement of defence as hereunder set forth:

- "1. Defendant denies allegations contained in paras. 1, 2, 3, 5, 6 and 7 but admits para. 4 of the defence (plaint).
2. Defendant denies that 2nd defendant was the agent of defendant to give instructions to the plaintiff to enter into a contract to repair motor vehicle No. URY 611 as alleged in para. 1 of the plaint or at all. 2nd defendant had no authority to order any repairs to be undertaken on defendant's behalf.
3. If 2nd defendant pledged the credit of defendant by a misrepresentation that he had authority of defendant which is denied, and if by reason thereof defendant is liable to plaintiff which is denied then defendant claims judgment against the 2nd defendant with plaintiff's and defendant's costs for the amount of any judgment and costs given against defendant as damages for wrongfully warranting that he had authority to pledge the credit of defendant."

On the other hand the second defendant had pleaded in paras. 1 to 5 in the following terms:

- "1. On or about July 26, 1962, the 2nd defendant, at the special instance and request of the 1st defendant, surveyed at the premises of Expert Garage Ltd. in Masaka a damaged motor vehicle URY 611 owned by one Sharif A. K. Jafry and insured by the 1st defendant, and upon such survey the 2nd defendant furnished his survey report to the 1st defendant.
2. At the time of the 2nd defendant's survey as aforesaid, the said Expert Garage Ltd. had already carried out certain repairs to permit the removal of the said motor vehicle and had indicated that it (Expert Garage Ltd.) was unable to carry out other major repairs, and the 2nd defendant communicated such information to the 1st defendant.
3. On or about August 9, 1962, the 1st defendant (by its representative, one Natubhai) instructed the 2nd defendant to attend at the premises of

the plaintiff in Kampala (to which premises the said motor vehicle had been brought) and on behalf of the 1st defendant to negotiate and agree with the plaintiff the extent and cost of repairs to the said vehicle and further to authorise the plaintiff to carry out such repairs.

4. In pursuance of the 1st defendant's instructions and authority to him as aforesaid, the 2nd defendant entered into an agreement with the plaintiff whereby he authorised the plaintiff to carry out the agreed repairs at the cost of Shs. 6,235/72, but the 2nd defendant says that the said agreement was made by him not on his own account, but only as agent for the 1st defendant, as the plaintiff at the time of the making of the said agreement well knew.
5. At the time of the making of the said agreement, the 2nd defendant disclosed to the plaintiff the name of his principal (namely that of the 1st defendant) for whom he was the agent only and the plaintiff elected to treat the 1st defendant as the contracting party."

From these pleadings, it is apparent that the claim against the second defendant was in the alternative, and that the first defendant company were denying the authority of the second defendant to pledge their credit. They denied that the second defendant had authority to act as their agent and to bind them by any contract at all. They also denied liability for the work done and for the parts supplied.

The second defendant had pleaded that he had acted with the full authority and as the agent of the first defendant company.

At the trial on November 22, 1963 the first defendant company, without any contest, submitted to judgment; and judgment was accordingly by consent entered against the first defendant company alone in favour of the plaintiff company in the sum of Shs. 6,323/30 claimed, with costs, and interest at 6 per cent. The suit against the second defendant was dismissed, with costs. But as there was controversy as to who should pay the second defendant's costs the issue was adjourned for argument.

On January 21, 1964 the question of costs came up for consideration by the court. Counsel for the plaintiff company submitted that the first defendant company should be ordered to pay the costs of the second defendant because the first defendant company had, by disputing the authority of the second defendant as their agent, induced the plaintiff company to join the second defendant as a party to the suit, thereby causing the plaintiff to incur more costs than necessary. He submitted further that, under Order 1, r. 7 of the Civil Procedure Rules, the plaintiff company were entitled to join the second defendant in the suit as the plaintiff company was placed in doubt as to the person from whom they were entitled to obtain redress.

In support of this submission, counsel for the plaintiff company cited and relied upon *Bullock v. London General Omnibus Co. & Others* (1); *Sanderson v. Blyth Theatre Co.* (2); and *Besterman v. British Motor Cab Co. Ltd.* (3).

The application that the costs of the second defendant should be borne by the first defendant company has been opposed by counsel for the first defendant company, on the sole ground that there was a misjoinder. Counsel for the first defendant company contended that since the second defendant had disclosed to the plaintiff that in contracting with the plaintiff company he had done so on behalf of the first defendant company as their agent, it was wrong for the plaintiff to have joined him in the action as a co-defendant. The second defendant did not appear.

The issue of misjoinder of parties which has been raised and elaborately argued and appears to loom large in these proceedings seems to me to be irrelevant at

this stage of the proceedings in this case. It is too late in the day to contend, as has been contended by counsel for the first defendant company, that it was wrong for the plaintiff company to have joined the second defendant in the suit and that the proper course was for the plaintiff to have sued the first defendant company alone, the second defendant being called only as a witness by him. That probably would have been a sound argument on the question of a misjoinder properly raised and argued before the court at the proper stage of the proceedings.

As it is the proceedings in this case have terminated except as to the question of the second defendant's costs, the case having proceeded to judgment without the first defendant company having taken any steps to point out this so-called error either in their statement of defence or in the course of the proceedings before judgment. If a defect in the proceedings it was, and I do not agree that it was under the Civil Procedure Rules of this court, it was a curable one. It was not a fundamental mistake.

In the words of Collins, M.R. in *Bullock v. London General Omnibus Co. & Others* (1) ([1907] 1 K.B., at p. 270):

"If in fact there was such a misjoinder it was for the defendants to take steps to remedy it; no such steps were taken and it is much too late to complain of the irregularity if there was one. I see no connection between the right to make '*an order for costs in the present case*' and a technical error which could have been remedied at the proper time."

I agree with counsel for the first defendant, that *Bullock v. London General Omnibus Co. & Others* (1) was a case of personal injury as a result of a collision involving two vehicles, and that in such cases it is not unusual to join the owners of the vehicles concerned where negligence is imputed to both vehicles.

It may be observed that if I were of opinion that the question of misjoinder was relevant to the issue of costs under consideration, I would have ruled against the contention of counsel for the first defendant company, as, in my view, there was no misjoinder at all. For, on the pleadings, the first defendant company did not only deny liability for the debt claimed but went further. They repudiated the authority of the second defendant to have contracted as their agent and on their behalf, while the second defendant insisted that in contracting as he did, he had acted as the agent of the first defendant company with full authority in that behalf. I accept the contention of counsel for the plaintiff company that on the face of the pleadings a reasonable doubt was created as to which of the defendants was really liable for the debt. In such circumstances, it is my view that the plaintiffs were justified under Order 1, r. 7 of the Civil Procedure Rules in joining the two defendants in the suit. It was necessary to so join them in order that the question as to which of them is liable, and to what extent, may be determined as between them. In the instant case the claim against the second defendant was in the alternative.

The real question before this court is whether in the circumstances of this case the burden of the costs to which the second defendant is rightly entitled and which he has been awarded by this court should fall upon the plaintiff company, or upon the first defendant company.

Of the cases cited to the court, I think the most helpful and relevant is *Sanderson v. Blyth Theatre Co.* (2). There an action was brought originally against the Blyth Theatre Co. alone to recover the sum of £189 11s. 6d. for work done and materials supplied in connection with the defendant's theatre at Blyth. The statement of claim alleged that the work was done and the materials supplied at the request of the company by their agent, one William Hope, the architect employed by the defendants in building the theatre. By their defence the company denied, among other things, that they or their agent requested the plaintiff to supply materials or do the work as alleged in the statement of claim.

Thereupon the plaintiff took out a summons for leave to add Hope as a defendant to the action, and, an order was made giving the plaintiff liberty to amend the writ by adding the name of Hope, and to amend the statement of claim by claiming, in the alternative, against Hope the same sum as that claimed against the company; and, in further alternative, claiming the same sum against Hope by way of damages for breach of warranty of authority to order the work and materials. The question of costs of, and incidental to the application was reserved. The written statement of claim was amended accordingly. The company put in an amended defence alleging that Hope had no authority to employ the plaintiff. Hope by his defence denied that he was the agent of the company and set up other defences identical with those set up by the company.

At the trial the jury found a verdict for the plaintiff against the company. The judge thereupon ordered that judgment be entered against the company and for the defendant, Hope; and also ordered that the defendant, Hope, should recover against the plaintiff costs to be ascertained, and that the plaintiff should recover costs against the defendant company to be taxed, and also the plaintiff's taxed costs occasioned by joining the defendant, Hope, including the costs, which the plaintiff was adjudged to pay to the defendant Hope.

On appeal, the order was affirmed, the Court of Appeal holding that in an action in the Kings Bench Division claiming relief against the defendants in the alternative the court had jurisdiction in a proper case to order the unsuccessful defendant to pay the costs of the successful defendant or to order the plaintiff to pay the costs of the successful defendant, and then, to add those costs to the costs which the unsuccessful defendant was ordered to pay to the plaintiff.

The latter course should be adopted when the action is tried with a jury and the judge does not think that there is "good cause" for depriving the successful defendant of costs.

It may be of interest to note that this decision of the Court of Appeal in that case was considered with approval recently in *Mayer v. Harte & Others* (4) by the Court of Appeal in England, in which it was held, inter alia, that costs are in the discretion of the court subject only to the requirement that the discretion must be judicially exercised.

I am of the opinion that in the final analysis the power of this court on the question of costs is regulated by s. 27 (1) of the Civil Procedure Ordinance, to which neither counsel had directed the court's attention, the provisions whereof being as follows:

"27(1) Subject to such conditions and limitations as may be prescribed, and to the provisions of any law for the time being in force, the costs of and incident to all suits shall be in the discretion of the court or judge and the court or judge shall have full power to determine by whom and out of what property and to what extent such costs are to be paid, and to give all necessary directions for the purposes aforesaid. The fact that the court or judge has no jurisdiction to try the suit shall be no bar to the exercise of such powers:

Provided that the costs of any action, cause or other matter or issue shall follow the event unless the court or judge shall for good reason otherwise order."

In the result I think that the reasonable order to make in the instant case is that costs of the second defendant shall be paid by the first defendant company as I am satisfied that, having regard to the conduct of the first defendant company in submitting to judgment without any contest, and having regard to the state of the pleadings, it was unreasonable for the first defendant company to have denied the authority of the second defendant, who was truly their agent. I rule

that the costs of the second defendant shall be paid by the first defendant company.

Order accordingly.

For the plaintiff:

Chand & Mehta, Kampala

N. B. Mehta

For the first defendant:

Wilkinson & Hunt, Kampala

R. E. Hun

For the second defendant:

Pareukji & Co., Kampala

B. D. Dholakia

Karsan & Company v Akberali Jaffer
[1964] 1 EA 21 (HCT)

Division:	High Court of Tanganyika at Dar-es-Salaam
Date of judgment:	18 July 1963
Case Number:	6/1963
Before:	Spry J
Sourced by:	LawAfrica

[1] Practice – Execution – Arrest of judgment-debtor – Judgment-debtor about to file petition in bankruptcy – Debtor released upon signature of surety bond – Bond to appear in court when required – Amount of bond paid into court on failure to appear – Whether decree holder entitled to amount – Indian Code of Civil Procedure, 1908, s. 55(4).

Editor's Summary

In execution proceedings the judgment-debtor, when arrested and brought before the court, indicated that he intended to file a bankruptcy petition. An order was accordingly made whereby the defendant was released under s. 55(4) of the Indian Code of Civil Procedure 1908 on signing a surety bond for Shs. 500/- to appear in court in thirty days and report progress. The defendant reported to the court once but failed to appear again and was re-arrested and released on payment into court of Shs. 500/-. Later the magistrate, having invited the plaintiff's advocate to show cause why the Shs. 500/- should not be forfeited to the Government under s. 47 of the Indian Code of Civil Procedure, ruled that the Shs. 500/-

should be forfeited to the Government and was not for the benefit of the decree holder. In revision,

Held –

- (i) when an order is made under s. 55(4) of the Indian Code of Civil Procedure, 1908, it should specify three conditions, first that the judgment-debtor will, within one month, apply to be declared an insolvent, secondly, that he will appear when called upon in any proceeding on the application and, thirdly, that he will appear when called upon in any proceeding upon the decree in execution of which he was arrested;
- (ii) the granting of relief to the judgment-debtor under s. 55(4) imperils the position of the decree-holder and the security, although immediately payable to the court, ensures for the benefit of the decree holder except so far as it may exceed the amount payable under the decree.

Ruling of the magistrate set aside. Order that the proceeds of the security realised be paid to the plaintiffs.

Cases referred to in judgment:

- (1) *Basanti Lal v. Chhedo Singh* (1912), 39 Cal. 1048.
- (2) *Surendra Nath Ghose & Another v. Keshab Lal Ghosh & Others*, [1912] A.I.R. Cal. 559.
- (3) *Sadikalli Moosaji v. Hassassing Tahilsingh & Another*, [1936] A.I.R. Sind. 244.

Judgment

Spry J: By his ruling dated June 21, 1963, the acting resident magistrate, Kigoma, held that where a security is realised under s. 55(4) of the applied Indian Code of Civil Procedure, 1908, the proceeds become the property of the Government and do not enure for the benefit of the decree holder. As this ruling appeared to be one from which no appeal lay and as it involved a matter of principle, the acting resident magistrate brought it to the attention of this court, so as to enable this court to exercise its revisional jurisdiction, if it should so think fit.

As the question affects the general revenue, I thought it proper to give notice to the Solicitor-General, but he did not wish to be heard. I did not consider it necessary to call on Mr. N. Z. Karsan, who had acted for the plaintiffs in the suit which gave rise to the ruling.

The plaintiffs in that suit obtained judgment against the defendant for Shs. 2,909/88, interest and costs. A decree was issued and various abortive attempts were made to execute it, first by attachment of property and subsequently by arrest of the judgment debtor. Eventually, the defendant was brought before the court on December 5, 1962, when he said that he intended to file a petition in bankruptcy and the then acting resident magistrate made the following order:

“I release you on your own surety of Shs. 500/- to return in 30 days’ time (4.1.63) and report progress.”

The defendant signed a bond for Shs. 500/-, the condition of which was that he would attend the court on January 4, 1963, “to report progress in bankruptcy”. It appears that the defendant did report to the court once, the record does not show on what day, and was in effect given an extension of time. He failed to appear again and was re-arrested but was released on payment into court of the sum of Shs. 500/-, the amount of the bond. On March 27, 1963, the acting resident magistrate (who had assumed office in the meanwhile) invited Mr. Karsan to show cause, under s. 47 of the applied Indian Code of Civil Procedure, 1908, why the said sum of Shs. 500/- should not be forfeited to the Government. Mr. Karsan replied by letter, submitting that s. 47 had no application but arguing on the substantial issue that the plaintiffs as decree holders should be regarded as the ultimate beneficiaries of the amount of the bond. He cited in support certain Indian authorities. He commented also that in his opinion the amount of the security ordered had been inadequate. After some correspondence, the acting resident magistrate gave the ruling now under consideration.

Section 55 relates to the arrest and detention of judgment debtors, and sub-s. (4) reads as follows:

“Where a judgment-debtor expresses his intention to apply to be declared an insolvent and furnishes security, to the satisfaction of the court, that he will within one month so apply, and that he will appear, when called upon, in any proceeding upon the application or upon the decree in execution of which he was arrested, the court shall release him from arrest, and, if he fails so to apply and to appear, the court may either direct the security to be realised or commit him to civil prison in execution of the decree.”

I would begin by observing that it was unfortunate that the order of December 5, 1962, did not follow the wording of the statute. The looseness of the order might well have had the effect of making it unenforceable. Any such order and any such bond must specify the three conditions, first, that the judgment debtor will, within one month, apply to be declared an insolvent, secondly, that he will appear when called upon in any proceeding on the application and, thirdly, that he will appear when called upon in any proceedings upon the decree in execution of which he was arrested.

Turning now to the very carefully reasoned ruling of the acting resident magistrate, he began by noting that the subsection, as in force in Tanganyika, contains the word “shall”, which was replaced in India in 1921 by the word “may”. He concluded from this that modern Indian authorities are not relevant, as being “based on an entirely different footing”. With respect, I think that is reading too much into the change: I do not think the discretion given to the court was intended to do anything more than enable the court to refuse relief in cases such as those referred to in Order 21, r. 40(2).

The acting resident magistrate then rejected a submission by Mr. Karsan that the “security” referred to in s. 55(4) must be the bond of a surety and held that the court could in its discretion accept security from the judgment debtor himself or from a surety. In this I think he was undoubtedly correct. I would only observe, as a matter of practice, that I cannot think that any useful purpose will normally be served by taking a bond without sureties from a judgment debtor who is proposing to go into bankruptcy. When no sureties are offered, the security should be cash.

In this connection, it is curious that none of the authorities deal with the purpose of s. 55(4). It appears to me to provide for the judgment debtor who has property but who, realising that he is insolvent, does not wish even involuntarily to prefer one of his creditors. As such, it is analogous to s. 102 of the Bankruptcy Ordinance (Cap. 25). It can hardly be intended to relieve the judgment debtor who has no property, since he is not, in the absence of special circumstances, liable to be committed.

Reverting to the ruling under consideration, the acting resident magistrate expressed the opinion that:

“The purpose of the subsection is not to ensure that the judgment debt will be paid but to ensure that the judgment debtor will either apply to be declared bankrupt or else appear before the court when required for further proceedings.”

I would observe in passing, as I have said earlier, that the obligations are cumulative, not alternative. He went on:

“The security, no matter by whom it is given, is thus to secure his undertaking to the court, and when that undertaking is not fulfilled the security is forfeited to Government by way of a penalty.”

At first sight, that is an attractive argument but I do not think it can be sustained. On general principles, the procedure for arrest and detention is part of the process of execution which exists for the benefit of judgment creditors. Section 55(4) merely provides a form of relief. As I have already indicated, it must, in my opinion, exist for the benefit of the debtor who has property but does not wish to deliver it to the decree holder, since to do so would amount to a preference, but who would by refusing render himself liable to committal but for the provisions of the subsection. The granting of relief is therefore imperilling the position of the decree holder and it would seem unreasonable that the security taken should not, if it comes to be realised, enure for his benefit.

This view is supported by the wording of the subsection, which provides that if the judgment debtor defaults,

“the court may either direct the security to be realised or commit him to civil prison in execution of the decree.”

On this the acting resident magistrate commented:

“In my view the words ‘in execution of the decree’ relate solely to the discretion to ‘commit him to civil prison’ and not to the earlier discretion to realise the security, which is linked with the undertaking to the court.”

With respect, I cannot agree. It seems contrary to the ordinary meaning of the words used; what is more, I think it is inconceivable that the legislature should have provided alternative default penalties, intending one to be a punishment and the other a part of the process of execution. Since imprisonment, if imposed, is expressly in execution, I think the realisation of the security must also be for the benefit of the judgment creditor.

I am reinforced in my opinion by three Indian cases, which, although not binding on this court, are of persuasive value. They are *Basanti Lal v. Chhedo Singh* (1), *Surendra Nath Ghose and Another v. Keshab Lal Ghosh and Others* (2) and *Sadikalli Moosaji v. Hassasing Tahilsingh and Another* (3). They are all directly in point, to the effect that the security, although immediately payable to the court, ensures for the benefit of the decree holder except so far as it may exceed the amount payable under the decree. I am not aware of any Indian authority to the contrary effect.

I accordingly set aside the ruling of the acting resident magistrate and direct that the proceeds of the security realised be paid to the plaintiffs, provided of course, that they do not exceed the amount presently payable under the decree.

Ruling of the magistrate set aside. Order that the proceeds of the security realised be paid to the plaintiffs.

Babubhai Dhanji Pathak v Zainab Mrekwe
[1964] 1 EA 24 (HCT)

Division:	High Court of Tanganyika at Dar-es-Salaam
Date of judgment:	10 September 1963
Case Number:	6/1963
Before:	Law J
Sourced by:	LawAfrica

[1] *Practice – Parties – Dead plaintiff – Action begun in name of dead plaintiff – Application to substitute name of new plaintiff – Jurisdiction to make order – Indian Code of Civil Procedure, 1908, Order 1, r. 10.*

Editor's Summary

An action was filed in the name of the respondent forty-five days after her death. Subsequently an application to amend the plaint by substituting the name of another person as plaintiff was made under Order 1, r. 10 of the Indian Civil Procedure Code, 1908 and the magistrate, who was not informed that the plaintiff was dead when the action was filed, made the order sought. The defence pleaded, inter alia, that the suit was a nullity, having been filed in the name of a deceased person. The magistrate, however, gave judgment for the plaintiff for the sum claimed. On appeal,

Held –

- (i) a suit instituted in the name of a dead person is a nullity;
- (ii) the power conferred by Order 10, r. 1 to substitute a plaintiff where a suit has been filed in the name of a wrong person, can only be exercised where the “wrong person” is living at the date of instituting the suit, and has no application where the “wrong person” is dead at such date.

Appeal allowed.

Cases referred to in judgment:

- (1) *Makram Ali Moalla & Others v. Abdul Hamid Moalla & Others*, [1927] A.I.R. Cal. 860.

(2) *Rangrao Vyankatesh Deshpande v. Kashinatti Dhondur*, [1947] A.I.R. Nag. 93.

(3) *Tetlow v. Orela Ltd.*, [1920] 2 Ch. 24.

(4) *Alexander Mountain & Co. v. Rumere Ltd.*, [1948] 2 K.B. 436.

Judgment

Law J: This is an appeal by the defendant Babubhai Dhanji Pathak (whom I shall refer to hereinafter as the tenant) from the judgment and decree in Dar-es-Salaam District Court Civil Case No. 545 of 1961. The plaint in that suit was filed on February 16, 1961, and the plaintiff was described as “Zainab binti Mrekwe by her duly constituted attorney Said Salum”. In actual fact Zainab binti Mrekwe had died on January 1, 1961, forty-five days before the institution of the suit.

On July 12, 1961 counsel for the plaintiff applied to amend the plaint, under Order 1, r. 10, of the Indian Civil Procedure Code, 1908, by substituting Said Salum as plaintiff in the place of Zainab binti Mrekwe, on the ground that the suit premises had been conveyed to Said Salum by Zainab binti Mrekwe on July 14, 1959. Said Salum gave evidence that the suit had been filed in his mother’s name by mistake. The learned magistrate was not informed either by Said Salum or counsel for the plaintiff that Zainab binti Mrekwe had died before the institution of the suit. Leave to amend the plaint was granted by substituting Said Salum as plaintiff in the place of Zainab binti Mrekwe. On January 3, 1962, leave was given to the plaintiff Said Salum to file an amended plaint. This was filed on January 19, 1962, and for the first time it was disclosed, in para. 7, that Zainab binti Mrekwe had died before the institution of the suit.

The tenant filed an amended written statement of defence pleading inter alia that the original plaint was not maintainable, having been filed by a deceased person, and that the suit had abated. On February 21, 1963, judgment was given for the plaintiff for the amount claimed, Shs. 2,100, and costs.

The tenant appeals on a number of grounds, the most important of which are contained in paras. 1-4 of the memorandum of appeal. The submissions of counsel for the tenant on these paragraphs can be summarized as follows:

A suit filed in the name of a sole plaintiff who has died before the institution of the suit is a complete nullity, so that the order of the lower court substituting the present respondent as plaintiff in the place of the deceased Zainab binti Mrekwe, and the various orders directing amended pleadings, were made without jurisdiction and are void.

Counsel for the respondent submits that the order substituting the present respondent as plaintiff was validly made under Order 1, r. 10(1), the lower court having been satisfied that the suit was instituted in the name of the wrong person by reason of a bona fide mistake. To this counsel for the tenant replies that the words “wrong person” in the sub-rule relate to a living person. He has referred me to *Makram Ali Moalla and Others v. Abdul Hamid Moalla and Others* (1) in which it was held that a suit brought in the name of a dead person as sole plaintiff cannot be amended.

In the course of his judgment, Cumming, J. said:

“Now, obviously, if this were the case of a sole plaintiff who was dead at the time of the institution of the suit there would have been no suit which could have been amended in any way because a dead person cannot institute a suit.”

In *Rangrao Vyankatesh Deshpande v. Kashinatti Dhondhu* (2), Niyogi, J. said:

“If the sole plaintiff or all the plaintiffs instituting a suit is or are dead, the plaint is one presented by a dead person or persons. The institution of the suit therefore is void and is of no effect. No question of mistake or misdescription of party is involved in such a case so as to attract the application of Order 1, r. 10.”

As sub-r. (1) of Order 1, r. 10 is almost identical with Order 16, r. 2 of the Rules of the Supreme Court in England, I have referred to the Annual Practice and found, in the notes to that rule, the following note:

“*Dead Party*. – This rule only applies to substitution or addition where the person originally made a party was alive at the date of the writ. (*Tetlow v. Orela Ltd.* (3))”

In that case, Russell, J. (as he then was) said, with reference to Order 16, r. 2:

“In my opinion that rule means that, where an action has been commenced between two living parties by a living plaintiff, and the living plaintiff afterwards turns out to be the wrong person, an application may be made to the court, and the court can substitute another person for the living plaintiff or may add another person as co-plaintiff as the case may be. But it does not justify the court in creating a plaintiff in the action for the first time.”

Tetlow's case (3) was distinguished, but not overruled, in *Alexander Mountain & Co. v. Rumere Ltd* (4), and the dictum of Russell, J. in *Tetlow's* case (3), which I have quoted above, was referred to with apparent approval by Scott, L.J.

On consideration of the above authorities, I am left with no doubt that this appeal must succeed. A suit instituted by a dead person is a nullity. The power to substitute a plaintiff where a suit has been filed in the name of a wrong person, conferred by Order 10, r. 1(1) in the First Schedule to the Indian Civil Procedure Code, can only be exercised where the “wrong person” was living at the date of instituting the suit, and has no application where the “wrong person” was dead at such date. The order of the lower court dated July 12, 1961 ordering the substitution of the present respondent as plaintiff in the place of his deceased mother, the original plaintiff, was made without jurisdiction and is void and of no effect.

The respondent has only himself to blame for this state of affairs, by his failure to reveal to the lower court, and presumably to his advocate, the fact that Zainab binti Mrekwe had died before the presentation of the plaint, although he gave evidence on affirmation in support of his application to be substituted as plaintiff. Had the magistrate been informed of the fact that the plaint had been filed in the name of a deceased person, he would inevitably have ordered its rejection as a nullity and refused to make any order of substitution. The protracted and no doubt expensive proceedings since that date, including this appeal, are all due to the respondent's extraordinary behaviour in not revealing the fact of his mother's death until the amended plaint was filed on January 19, 1962, nearly a year after the institution of the suit.

As I have indicated, this appeal succeeds for the reasons stated above, but in case my view of the law relating to the institution of a suit in the name of a deceased person does not meet with approval in another place, I will deal shortly with the other grounds of appeal. The respondent's claim against the tenant was for seven months rent at Shs. 300/- a month allegedly due under an agreement in writing, for the period April to October 1960 inclusive. During this

period the Rent Restriction Ordinance (Cap. 301) was in force, but it expired on January 1, 1961. The premises occupied by the tenant were residential and subject to control under the Ordinance, but neither the landlord nor the tenant had applied to the Rent Restriction Board to determine the standard rent. It is common ground that the standard rent for identical premises in the same building had been determined by the Board as being Shs. 110/- a month. Counsel for the appellant complains that the learned resident magistrate erred in not holding that the standard rent of the demised premises was Shs. 110/- a month, and in holding that the landlord was entitled to claim the contractual rent of Shs. 300/- a month.

In my opinion the magistrate was right on both points. It was open to the tenant, at any time during the tenancy, to apply for the standard rent of the demised premises to be determined. He did not exercise this right. It may well be that, if he had done so, the standard rent would have been fixed at Shs. 110/-, but it is by no means certain. Counsel for the appellant has not been able to quote any authority to support his submission that an agreement to pay more than the probable standard rent for controlled premises is unlawful and unenforceable. The last ground of appeal was that the magistrate's order granting the plaintiff costs was wrong, as a considerable proportion of the costs incurred in the suit was directly due to applications and amendments necessitated by the irregular presentation of the suit. On this point I agree with counsel for the appellant, and had the appeal not succeeded, I would have made some order in favour of the appellant so far as the order for costs in the lower court was concerned, or remitted the suit for further consideration of the question of costs.

As it is, this appeal succeeds, with costs to the appellant, both here and below.

Appeal allowed.

For the appellant:

Sayani & Co., Dar-es-Salaam

N. R. D. Sayani

For the respondent:

Mahmud N. Rattansey & Co., Dar-es-Salaam

M. N. Rattansey

Ashabhai Bhailalbhair Patel v Bhanubhai Chunibhai Gajjar
[1964] 1 EA 27 (CAK)

Division:	Court of Appeal at Kampala
Date of judgment:	11 January 1964
Case Number:	51/1963
Before:	Sir Ronald Sinclair P, Crawshaw and Newbold JJA
Sourced by:	LawAfrica
Appeal from:	The High Court of Uganda – Jeffreys Jones, J.

[1] Infant – Contract – Employment of infant – Claim by infant against employer – Validity of contract for personal services by infant – Whether infant competent to sue for salary.

[2] Infant – Employment of infant – Earnings paid to father by employer – Action by infant against employer for salary – Whether father can give good receipt for earnings of infant.

Editor's Summary

The respondent, an infant, suing by his father as next friend claimed from the appellant Shs. 5,000/- as agreed salary for his services in 1957 and 1958 as an assistant at the appellant's shop. The defence of the appellant averred that if there was any agreement as alleged in the plaint, which was denied, such agreement was void and unenforceable as the respondent was a minor and that in any

event the claim for Shs. 5,000/- was satisfied by payment to the respondent's father of the sum of Shs. 4,000/- in cash and by goods supplied to the respondent's father to the value of Shs. 1,000/-. The judge found that the respondent had worked as claimed, that there was an agreement to pay the salary as alleged and that the sum of Shs. 5,000/- was satisfied as alleged in the defence, but he gave judgment for the respondent on the grounds that the contract sued upon was enforceable as the respondent had performed his part and it was for his benefit; and that the respondent's father could not give a good receipt on behalf of the respondent. On appeal neither of the parties sought interference with the findings of fact in the court below.

Held –

- (i) the respondent was not entitled to rely upon s. 70 of the Indian Contract Act, 1872, because his claim as disclosed by the pleadings was based upon an express contract to which s. 70 did not apply;
- (ii) [Per Sir Ronald Sinclair, P., and Crawshaw, J.A.]: the respondent, though an infant, was entitled to recover the agreed remuneration from the appellant on the basis that the consideration from the respondent had already passed, leaving to be fulfilled only the promise of the appellant;
- (iii) the evidence indicated that the respondent's father had not accounted to the respondent for the money he had received from the appellant and since the appellant had paid the respondent's father at his own risk the appellant was not discharged from liability to the respondent.

Appeal dismissed.

Cases referred to in judgment:

- (1) *Tejura (Girdharlal N.) v. Bhagwanji Lalji Ltd.*, [1959] E.A. 109 (U.).
- (2) *Bibee (Mohori) v. Ghose (Dhurmodas)* (1903), 30 I.A. 114.
- (3) *Ram (Bhola) v. Ram (Bhagat)*, [1927] A.I.R. Lah. 24.
- (4) *Rani (Raj) v. Adib (Prem)*, [1949] A.I.R.Bom. 215.
- (5) *Lakshman (Hanmant) v. Narinha (Javarao)* (1889), 13 Bom. 50.
- (6) *Ghaffar (Abdul) v. Ram (Piare Lal Salig)* (1935), 16 Lah. 1.
- (7) *Chariar (Raghava) v. Chariar (Srinivasa Raghava)* (1917), 40 Mad. 308.
- (8) *Narayan (Satya-Deva) v. Presad (Tirbeni)*, [1936] A.I.R. Pat. 153.
- (9) *R. v. Chillesford* (1825), 4 B. & C. 94; 107 E.R. 994.
- (10) *Dagley v. Tolferry* (1715), 1 P. Wms. 285; 24 E.R. 391.
- (11) *Re Long, Lovegrove v. Long*, [1901] W.N. 166.
- (12) *Re Marquis of Salisbury and Ecclesiastical Commissioners* (1876), 2 Ch. D. 29.
- (13) *Ex parte Bond* (1847), 16 L.J. Ch. 147.
- (14) *R. v. Thorp* (1697), Carth. 384; 90 E.R. 824.
- (15) *M'Creight v. M'Creight* (1849), 13 Ir. Eq. R. 314.

(16) *Doyle v. White City Stadium*, [1935] 1 K.B. 110; [1934] All E.R. Rep. 252.

The following judgments were read:

Judgment

Sir Ronald Sinclair P: This is an appeal from a judgment and decree of the High Court of Uganda. The respondent, a minor suing by his next friend, his father, claimed from the appellant, an Asian trader, the sum of Shs. 5,000/-, as to Shs. 2,000/- thereof being the agreed salary for the year 1957 and as to Shs. 3,000/- thereof being the agreed salary for the year 1958, the period during which the respondent worked as a shop assistant at the appellant's shop.

By his written statement of defence the appellant averred, first, that if there was any agreement as alleged in the plaint, which was denied, such agreement was

void and unenforceable as the respondent was a minor. Secondly, it was averred in paragraph 3 as follows:

“Plaintiff assisted in the shop of defendant in 1957 and 1958 as a pupil at the request of plaintiff’s father. Plaintiff was not employed by defendant. At the end of 1957 or thereabouts defendant decided to give a sum of Shs. 2,000/- to plaintiff’s father in appreciation of the assistance given by plaintiff as a pupil without any obligation to do so. In 1959, defendant decided to give to plaintiff’s father a further sum of Shs. 3,000/- in appreciation of the assistance given by plaintiff for the year 1958. The said gifts amounting to Shs. 5,000/- were satisfied by Shs 2,000/- cash given to plaintiff’s father on 31. 12. 59, Shs. 2,000/- cash given to plaintiff’s father on 4. 1. 60 and sundry goods of a value of Shs. 1,000/- given to plaintiff’s father.”

At the trial the father denied having received any sum from the appellant. The learned judge found that the respondent worked for the appellant during the years 1957 and 1958 and that the appellant agreed to pay the respondent the sum of Shs. 5,000/- in respect of those two years. He further found that in respect of such employment the appellant paid to the respondent’s father the sum of Shs. 4,000/- in cash and that the balance of Shs. 1,000/- was liquidated by the supply of goods to that value by the appellant to the respondent’s father. There is no appeal by either party from those findings of fact.

The learned judge held, following the decision of Bennett, J. in *Girdharlal N. Tejura v. Bhagwanji Lalji Ltd.* (1): (i) that the contract was enforceable, the respondent having performed his part and the contract being for his benefit; (ii) that the respondent’s father could not give a good receipt for the salary of the infant respondent.

As the respondent had not consented to the payment by the appellant to his father, the judge entered judgment for the respondent for Shs. 5,000/- together with interest and costs.

The appellant has appealed on two grounds: (1) that the claim was founded upon an express contract between the respondent and the appellant and that, the respondent being a minor, such a contract is void and unenforceable; (2) that, if the appellant was liable to pay Shs. 5,000/- to the respondent, the receipt by the respondent’s father of the sum of Shs. 5,000/- discharged the appellant’s liability to the respondent.

With regard to the submission that the contract was void and unenforceable the Indian Contract Act, 1872, as applied to Uganda was in force at the relevant time. Paragraphs (e), (g), (h) and (i) of s. 2 of that Act provide:

- “(e) Every promise and every set of promises, forming the consideration for each other, is an agreement:
- (g) An agreement not enforceable by law is said to be void:
- (h) An agreement enforceable by law is a contract:
- (i) An agreement which is enforceable by law at the option of one or more of the parties thereto, but not at the option of the other or others, is a voidable contract.”

Section 10, so far as material, reads:

“All agreements are contracts if they are made by the free consent of parties competent to contract, for a lawful consideration and with a lawful object, and are not hereby expressly declared to be void.”

Section 11 is important and deals with competency to contract:

“Every person is competent to contract who is of the age of majority

according to the law to which he is subject, and who is of sound mind, and is not disqualified from contracting by any law to which he is subject.”

It is common ground that the respondent was a minor at the time he was in the employ of the appellant.

As I have said, the learned judge relied on the decision of the High Court of Uganda in *Girdharlal N. Tejura v. Bhagwanji Lalji Ltd.* (1) the facts of which are very similar to those in the present case. In that case, referring to the contention of the defendant company which had employed the plaintiff that since the plaintiff was an infant he was not competent to enter into a contract, having regard to s. 11 of the Indian Contract Act, Bennett, J. said this ([1959] E.A., at p. 111):

“This may well be so, but the answer to this argument appears in the commentary on s. 11 in Pollock and Mulla on Indian Contract and Specific Relief Acts (8th Edn.), p. 69. To quote from the commentary: ‘A minor who gives value without promising any further performance to a person competent to contract is entitled to sue him for the promised equivalent. This may be properly not in contract but on a quasi-contract under s. 70 below’”

Section 70 of the Indian Contract Act reads:

“Where a person lawfully does anything for another person, or delivers anything to him, not intending to do so gratuitously, and such other person enjoys the benefit thereof, the latter is bound to make compensation to the former in respect of, or to restore, the thing so done or delivered.”

In the present case the learned judge went on to consider s. 70 as follows:

“Pollock and Mulla in their commentary on the Indian Contract and Specific Relief Acts (8th Edn.) said p. 429 on s. 70: ‘*This section* does not apply to persons who are incompetent to contract. The section refers to circumstances in which the law implies a promise to pay, and where there could not have been a legally binding contract, a promise to pay cannot be implied.’ Section 70 deals with quasi contracts and the obligations of persons enjoying the benefit of a non-gratuitous act.

Here, the act performed by the plaintiff was *not* a gratuitous act. In fact the defendant himself said that he had asked the plaintiff’s father to allow him to stay on as he was a bright boy.

I have no doubt that this contract was enforceable. The plaintiff had performed his part and the contract was certainly for his benefit. (*Girdharlal N. Tejura v. Bhagwanji Lalji Ltd.* (1); p. 109); *Doyle v. White City Stadium* (16).”

I confess that I am unable to follow the reasoning in that passage. If the learned judge took the view that the respondent was entitled to recover under s. 70, the quotation from Pollock and Mulla on which he apparently relied appears to be completely to the contrary.

I think it is desirable at this stage to dispose of the submission that the respondent could recover under s. 70. The respondent’s claim is based upon an express contract between himself and the appellant. Section 70 clearly has no application to an express contract and the pleadings are not sufficiently wide to cover a claim under that section. Indeed, counsel for the respondent virtually conceded that in view of the pleadings a claim under s. 70 could not succeed. It is unnecessary, therefore, to decide whether the section has any application to a minor and I prefer to leave the point open.

I turn now to s. 11 of the Act. Counsel for the appellant relied on the decision of the Privy Council in *Mohori Bibee v. Dhurmodas Ghose* (2) and submitted that

Tejura's case (1) was wrongly decided. In *Bibee's* case (2) the suit was by a minor to cancel a mortgage on the ground that it was void and inoperative as having been executed by the minor. Their Lordships held that the Indian Contract Act makes it essential that all contracting parties should be competent to contract, and expressly provides that a person who by reason of infancy is incompetent to contract cannot make a contract within the meaning of the Act and that, where he purports so to do, his alleged contract is void and neither s. 64 nor s. 65 of the Act can apply to it. Section 64 deals with the consequences of rescission of a voidable contract and s. 65 with the obligation of a person who has received an advantage under a void agreement or a contract that becomes void.

In the course of the judgment their Lordships said:

“The question whether a contract is void or voidable presupposes the existence of a contract within the meaning of the Act, and cannot arise in the case of an infant. Their Lordships are, therefore, of opinion that in the present case there is not any such voidable contract as is dealt with in s. 64.

A new point was raised here by the appellants' counsel, founded on s. 65 of the Contract Act, a section not referred to in the courts below, or in the cases of the appellants or respondent. It is sufficient to say that this section, like s. 64, starts from the basis of there being an agreement or contract between competent parties, and has no application to a case in which there never was, and never could have been, any contract.

It was further argued that the preamble of the Act shewed that the Act was only intended to define and amend certain parts of the law relating to contracts, and that contracts by infants were left outside the Act. If this were so, it does not appear how it would help the appellants. But in their Lordships' opinion the Act, so far as it goes, is exhaustive and imperative, and does provide in clear language that an infant is not a person competent to bind himself by a contract of this description.”

Subsequent to *Bibee's* case (2) there have been a number of decisions of the Indian courts that where the consideration has been received for an agreement consisting of a promise in favour of the minor, such promise can be enforced by the minor or on his behalf. That is, in effect, the meaning of the passage in Pollock and Mulla relied on by Bennett, J. in *Tejura's* case (1) namely:

“A minor who gives value, without promising any further performance to a person competent to contract is entitled to sue him for the promised equivalent.”

The authority for that passage is given as *Bhola Ram v. Bhagat Ram*, (3) (1927). That was a case in which two minors carrying on business together sued for the balance due for goods supplied. It was contended that if the dealings between the parties were void because of the minority of the plaintiffs, no liability in respect thereof could fall on the defendants. Zafar Ali, J., held that that contention was untenable and continued in his judgment:

“There is no conflict of opinion with regard to the competency of a minor to enforce a contract made in his favour for a valuable consideration and it has been held that ‘though a sale or mortgage of his property by a minor is void, *Mohori Bibi v. Dhamodas* [i.e. *Bibee's* case (2)], a duly executed transfer by way of sale or mortgage in favour of a minor who has paid the consideration money is not void and it is enforceable by him or by any other person on his behalf’: *Ulfat Rai v. Gauri Shankar* (1911), 33 All. 657; *Munni Kunwar v. Madan Gopal* (1916), 38 All. 62; and *Narain Das v. Mt. Dhanai* (1916), 38 All. 154; *Meghan Dube v. Pran Singh* (1908), 30 All. 63; *Munia Konan v. Perumal Konan* (1914), 37 Mad. 390; *Raghava v. Srinivasa* (1917), 40 Mad.

308; and *Madhah Koeri v. Baikuntha* (1919) 4 Pat. L.J. 682. It is a matter of common knowledge that a minor can make purchases in the bazaar and no trader after receiving money from him can refuse to deliver the goods purchased or to return the money. In *Raghava v. Srinivasa* (*supra*) a Full Bench of the High Court held that a mortgage executed in favour of a minor who has advanced the mortgage money is enforceable by him or by any other person on his behalf. It has also been held that a promissory note executed in favour of a minor is not void and can be sued upon by him: vide *Rangarazu v. Madura Basappa*, (1913), 24 M.L.J. 363. The principle underlying is that while no liability can be incurred by a minor, he is not debarred from acquiring a title to anything valuable.”

Nowhere in that judgment is there any reference to any section of the Contract Act.

Rani (Raj) v. Adib (Prem), (4), is the only case I have been able to find which concerns a contract of service by a minor. The contract, which was entered into by a father on behalf of his minor daughter, was executory and the suit was by the daughter for breach of contract. Desai, J., held that there being no contract enforceable at law, there was no breach of a contract in respect of which the daughter or her father could sue for damages. The following extracts from the judgment of Desai, J., ([1949] Bom., at p. 220) are of interest:

“Now though according to English law the minor would be liable in the case of a contract of service where the contract was for his benefit, it is clear that under s. 11, Contract Act the minor’s contract being void, the minor would not be held liable: see *Mohori Bibee v. Dhurmodas Ghose* (2).”

“As the minor’s contract is a void contract, he is not entitled to sue for damages for breach of such contract including the contract of service where the contract was entered into by the minor himself. The rights which a minor may gain under s. 70, Contract Act, are rights which, strictly speaking, do not arise by virtue of the contract made by the minor but by reason of the relationship resembling those created by a contract. It has been held in certain cases that where the minor has already given the full consideration to be supplied by him, he is entitled to enforce the contract: see *Hanmant Lakshman v. Javarao Narinha* (5), *Raghava Chariar v. Srinivasa Raghava Chariar* (7) and *Abdul Ghaffar v. Piare Lal Salig Ram* (6). I am not concerned with those cases because the contract that I am considering is an executory contract where the consideration is still to be supplied and has not already been supplied as in those cases by the minor.”

In the first of the three cases mentioned in the second of the above passages, *Hanmant Lakshman v. Javarao Narinha* (5), it was held that a money bond taken by a minor is good in law and may be sued on. The judgment is very brief and no reasons were given. In the third case, *Abdul Ghaffar v. Piare Lal Salig Ram* (6), it was held that where a minor has performed his part of a contract of sale and delivered the goods, he is entitled to maintain a suit for the recovery of their price. The authority for the decision was *Raghava Chariar v. Srinivasa Raghava Chariar* (7), the second of the three cases.

Chariar’s case (7) (referred to in *Bhola Ram v. Bhagat Ram* (3) as *Raghava v. Srinivasa*) is important and I shall refer to it in greater detail. It is a decision of a Full Bench of the Madras High Court. The question before the Full Bench was whether a mortgage executed in favour of a minor who has advanced the whole of the mortgage money is enforceable by him or by any other person on his behalf. The question was answered in the affirmative by the three members of the court.

Wallis, C.J., who delivered the first judgment, after referring to *Bibee's* case (2), said (40 Mad., at p. 313):

“The question then is whether it makes any difference that the transfer in favour of the minor by way of sale or mortgage is made in consideration of a price paid or a loan advanced by the minor. No doubt, according to their Lordships’ decision in *Bibee's* case (2), in such a case the minor could not bind himself by contract to pay the price or advance the mortgage money; but, when he has done so and the vendor or mortgagor has executed a registered conveyance in his favour, is there any reason why the transfer in his favour should not take effect?”

After stating that he was unable to see why the property should not pass to the minor under the transfer, he continued (*ibid.*, at p. 314):

“The provision of law which renders minors incompetent to bind themselves by contract was enacted in their favour and for their protection, and it would be a strange consequence of this legislation if they are to take nothing under transfers in consideration of which they have parted with their money. This precise question cannot arise in England where a purchase by a minor of immoveable property is voidable by him on attaining majority but not void *ab initio*, as it is only the contracts specified in the Infants Relief Act which are void. However even in the case of a contract which was void under the Infants Relief Act Lord Coleridge, C.J., and Bowen, L.J., held that a reasonable construction must be put upon the statute, and that when an infant had paid for something under a void contract and had used or consumed it, it would be contrary to natural justice that he should recover back the money which he had paid on the ground that the contract was void: *Valentini v. Canali*, (1889), 24 Q.B.D. 166: I do not think this decision is inconsistent with *Nottingham Permanent Benefit Building Society v. Thurstan*, [1903] A.C. 6, which decided, as I understand it, that the mortgage given by the minor as security for a void contract entered into by him was also void. Applying the same reasoning to the present case it would be even more opposed to natural justice to allow the transferor to a minor by way of sale or mortgage to question the transfer for which full consideration has been paid to him. In that case it was the minor who sought to take advantage in an unconscionable manner of the Act which had been passed for the benefit of minors. There is even less reason for allowing a vendor to a minor to take advantage of the minor’s statutory inability to contract which was imposed for his protection in order to avoid a transfer into which he entered with his eyes open.”

Abdur Rahim, J., found nothing in *Bibee's* case (2) which militated against the view which he took. He was of the opinion that there was no question of enforcing a contract made by the minor. He said (*ibid.*, at p. 316):

“The agreement sought to be enforced is the promise of the mortgagor who is of full age to repay the money advanced to him accompanied with a transfer of his interest in certain specific immoveable property for the purpose of securing the repayment of the money. The infant has already advanced the money which formed the consideration for the promise of the mortgagor and there is no question to be considered of enforcing any promise on the part of the infant.”

And (*ibid.*, at p. 318):

“All this indicates that what is meant by the proposition that an infant is incompetent to contract or that his contract is void is that the law will not enforce any contractual obligation of an infant.”

Srinivasa Ayyangar, J.'s, reasoning can be summarised as follows: – *Bibee's* case settled that an infant cannot bind himself by a promise and the question is whether the converse follows. A promise in law or an enforceable promise is a contract as defined by the Contract Act. A promise to be enforceable, that is, in order that it may become a contract, should, except in the cases provided for by s. 25 of the Act, be supported by lawful consideration; if it is, the promise is an enforceable promise, that is, it becomes a contract. If the consideration is an executed or past consideration (to a limited extent past consideration under the Act is sufficient consideration), the contract is a unilateral contract. "Consideration" as defined by the Act may consist in an act or forbearance or a promise to do or forbear on the part of the promisee. If the infant at the request of an adult promisor does some service, that would be sufficient consideration for the promise, and there is nothing to prevent the infant from enforcing the contract. By the acceptance of performance by the infant, the adult promisor may be taken to have renewed his promise; that is, although the original engagement was void the accepted performance gives rise to a unilateral contract which can be enforced by the infant.

Chariar's case (7) was followed in *Satya-Deva Narayan v. Tirbeni Prasad* (8)., The relevant part of the headnote of the latter case reads:

"It is the promise by a minor which is unenforceable, and an agreement embodying such a promise cannot be a contract. But an agreement as defined in s. 2 (e) of Contract Act does not necessarily consist of a set of promises forming the consideration for each other. Every promise is an agreement, that is to say, a promise made by an adult in favour of a minor is an agreement by the adult. If the consideration for such a promise or such an agreement is a reciprocal promise by the minor, the whole thing is void; but if the consideration for it is not a promise, but is something actually done, there seems no bar in the statute and no reason in principle why the result should not be a valid contract."

In *Chariar's* case (7) Wallis, C.J., referred to the English Infants Relief Act, 1874, s. 1 of which made certain contracts entered into by infants "absolutely void". As to the effect of the words "absolutely void" the learned author of Chitty on Contracts (22nd Edn.), Vol. I, para. 413, makes this comment:

"If the words of s. 1 of the Infants Relief Act are given their literal meaning, an infant cannot bring an action on a contract rendered 'absolutely void' by the Act. On the other hand, it has been urged that the intention of the Act was to provide further relief for infants and not to impose disabilities upon them which they did not possess before. If such is the case, the words mean scarcely more than 'void at the option of the infant'. A possible interpretation might be that an infant cannot enforce such a contract if still executory on both sides, but can sue, e.g. for breach of warranty where he has performed (or perhaps even where he is ready and willing to perform) his part of the agreement."

The point is one of considerable difficulty, but I have come to the conclusion, though with some hesitation, that the Indian decisions to which I have referred should be followed. I accept and adopt the reasoning of the learned judges in *Chariar's* case (7), particularly that of Srinivasa Ayyangar, J. I do not think those decisions conflict with *Bibee's* case (2) where the infant was seeking relief from an onerous obligation. Their Lordships' observations in that case must, I think, be read in the light of the particular circumstances of that case and the relief which was being sought. My conclusion, therefore, is that the respondent is not debarred from recovering by reason of infancy.

I turn now to the equally difficult question whether the receipt by the respondent's father of the sum of Shs. 5,000/- discharged the appellant from further liability. That question has two aspects. First, was the respondent's father entitled to his son's earnings so that he could give a good discharge for them? Secondly, as the respondent's guardian, could the father give a valid receipt to the appellant for those earnings?

The learned judge, relying on *Tejura's* case (1) held:

- “(a) whilst the right of a father to the fruits of his children's labour is not clearly defined, if a father has a right to the infant's earnings, it is a right which is maintainable only against the infant; there appeared to be no authority for the proposition that a father who maintained an infant child could sue in his own name for salary or wages earned by the infant.
- (b) the father could not give a good receipt for the salary of the infant plaintiff.”

In 21 Halsbury's Laws (3rd Edn.) p. 201, para. 444, it is stated:

“While infant children live with and are maintained by their father, he is entitled to the earnings of their labour.”

The authority for that statement is given as Blackstone's Commentaries, Vol. 1, p. 453. Referring to the same passage in Blackstone's Commentaries the learned author of *Simpson on the Law of Infants*, (4th Edn.), p. 130 comments:

“According to Blackstone, ‘A father may have the benefit of his children's labour while they live with him and are maintained by him; but this is no more than he is entitled to from his apprentices and servants.’ This may be taken as authority for the position that if a child works for his father he cannot afterwards claim wages on an implied assumpsit; whether the father has the same right to his children's earnings as a master has to those of his apprentice seems open to much doubt. The author has been unable to find any case in the books bearing directly on the subject, but such a right seems inconsistent with the right of an infant to sue for wages.”

After quoting that extract from *Simpson*, Bennett, J., said in *Tejura's* case (1):

“It would seem from this passage that if the father has a right to the infant's earnings, it is a right which is maintainable only against the infant. I can find no authority in the books for the proposition that a father who maintains an infant child can sue in his own name for salary or wages earned by the infant.”

In *Eversley on Domestic Relations* (6th Edn.), at p. 377, the author expresses the opinion that it is a doubtful point whether or not the father is entitled to the earnings of his child. After quoting the same passage from Blackstone he says:

“This proposition must be limited to children who are living with, and being reared and nurtured by, the parent, and does not apply to those who are emancipated and supporting themselves; and must mean that if a child works for its parent, it cannot afterwards recover on an implied contract to pay wages. But if a child enters, as he can do, into a valid contract of service with his parent for the payment of wages, the parent will not be entitled to retain such wages, but the child will be able to maintain an action for them against his parent.”

That an infant who in England enters into a contract of service, even if it be with his father, can sue for wages is clear from *R. v. Chillesford* (9). I think that is the position in Uganda also. Such a right is, to my mind, inconsistent with a right by the father to sue in his own name for the wages. Whether or not the father has a right to the child's earnings as against the child, if he cannot sue the child's employer in his own name for the earnings, and in my view he cannot, he is in my opinion unable as the father to give a valid discharge to the employer for such earnings. I am therefore in agreement with the view taken by Bennett, J., in *Tejura's* case (1).

The last question which remains to be decided is whether the respondent's father as the natural guardian of the respondent could give a good receipt to the appellant for the respondent's salary. In *Tejura's* case (1) Bennett, J., held that the capacity of a father as natural guardian to give a valid receipt or discharge for the property of his infant child is still governed by *Dagley v. Tolferry* (10), which decided that a father could not give a good discharge for a legacy of his infant child. He took the view that there is no good ground for any distinction between giving a receipt for the property of an infant and giving a receipt for the income of an infant.

Counsel for the appellant submitted that a father as guardian is entitled to receive his infant child's personal property and that he receives it as agent of the infant or, under the Indian Contract Act, as trustee. If, he argued, the father is competent to receive it, a person is entitled to pay it to him and a receipt by the father is a good discharge to the person paying. He relied on the last sentence of the following passage in 21 Halsbury's Laws (3rd Edn.), p. 201, para. 444:

"Unless expressly empowered so to do, a father cannot give a valid receipt or discharge for property of his infant child. If he receives it, he does so as guardian or agent for the infant. . . ."

Among the authorities cited in support of the last sentence of that passage are *Dagley v. Tolferry* (10) and *Re Long, Lovegrove v. Long* (11), both of which were referred to by Bennett, J., in *Tejura's* case (1). I shall return to *Re Long, Lovegrove v. Long* (11) later.

Counsel for the appellant also referred to the Tenures Abolition Act, 1660 and s. 4 of the Guardianship of Infants Act, 1886. The Tenures Abolition Act, 1660, conferred on the father the power of appointing by deed or will a guardian of his infant children, such guardian having the custody of the infant's estate both real and personal. That power was extended by s. 4 of the Guardianship of Infants Act, 1886, to the mother of the infant on the death of the father. It was argued that the father could not grant by deed powers which he did not have himself.

The rights of a father over his infant child's property are set out in 21 Halsbury's Laws (3rd Edn.), p. 203, para. 451 as follows:

"A guardian may be either of the person or of the estate of the infant or both. A guardian of the person has no authority over the infant's property, and a guardian of his estate has no authority over his person. Guardianship both of the person and the estate belongs to a testamentary guardian and to a surviving parent. The father, as guardian for nurture or by nature, is only a guardian of the person of the infant. A guardian appointed by the court is, in the absence of express direction, only a guardian of the infant's person; but the court may appoint him, or a separate person, to be guardian of the infant's estate."

That passage is supported by authority and I accept it as a correct statement of the law. In *Re Marquis of Salisbury and Ecclesiastical Commissioners* (12), Mellish, L.J., said (2 Ch.D., at p. 36):

“Then, does any such inconvenience or absurdity follow from holding the father to be the guardian meant by the statute, as to compel the court to adopt some other construction ? It is said that it does, because the father, though he is the guardian of the person, is not the guardian of the estate of the minor . . .”

In the same case Baggallay, J.A., said (ibid., at p. 38):

“It appears to me that the guardian, referred to in s. 1, must be the guardian of the infant’s estate, and not the guardian of his person only. The father, as such, is not the guardian of the infant child’s estate, though he is usually selected for that office when any appointment is made by the court, and he has no conflicting interest.”

Although the latter passage occurs in a dissenting judgment it appears to have been common ground that the father, as such, was not the guardian of the infant’s estate. In *Ex parte Bond* (13), the court appointed the father of the infant, guardian of his estate. There was no necessity for such an order if the father, as such, were the guardian of the estate. See also *R. v. Thorp* (14).

The kind of guardianship created by the Tenures Abolition Act, 1660 sprang directly from the abolition of military tenures and, to supply the loss of the feudal protection of infants, provision was made by the Act to enable fathers to appoint guardians, commonly known as “testamentary” guardians. That kind of guardianship is a creature of statute which, in my view, did not extend the authority of the father as natural guardian.

In *Re Long, Lovegrove v. Long* (11) it was held that the mother and guardian of an infant could give a valid receipt to trustees for the income of the infant arising from the residuary estate. Byrne, J., relied on the authority of *M’Creight v. M’Creight* (15). The report of the latter case is not available but it is referred to in Mews’ Digest of English Case Law to 1924, Vol. 10, p. 1271, as follows:

“Where an infant is entitled to a vested legacy, payment thereof during his minority by the executor to the testamentary guardian is valid, although the period directed by the testator for payment is the attainment of twenty-one years or marriage.”

I do not think there can be any doubt that the “mother and guardian” in *Re Long, Lovegrove v. Long* (11) was a testamentary guardian. In my view that case does not assist the appellant.

As to the statement in 21 Halsbury’s Laws (3rd Edn.), p. 201, para. 444, that if a father receives the property of his infant child he does so as guardian or agent for the infant, in view of the authorities to which I have referred, I do not think it can mean any more than that, if the infant’s property comes into the father’s hands, he must account for it to the infant. It does not mean that he is entitled to receive the property and give a valid receipt for it. In the present case the appellant paid the respondent’s father at his own risk. If the father did not account for the money to his son, the appellant was not discharged from liability to the son. The father has denied ever receiving the money and there is no evidence that he paid it to the son who was not cross-examined on the point. In the circumstances I think it must be taken that the father did not account to the respondent for the money. Irrespective of any action the respondent may have had against his father to account, for the reasons I have given the respondent had a right to sue the appellant for his salary and that he elected to do. It is not for us to say in these proceedings what claim, if any, the appellant may have against the father for money had and received.

I would accordingly dismiss the appeal with costs.

Crawshaw JA: I agree that for the reasons given by the President the appeal should be dismissed with costs. As to the void contract of service I think that the respondent, though an infant, was entitled to recover the agreed remuneration from the appellant on the basis that the consideration from the infant had already passed, leaving to be fulfilled only the promise of the appellant. This view accords with the decisions of the courts of India over the period of some sixty years following the decision of the Privy Council in *Mohori Bibee v. Dhurmodas Ghose* (2). I find particularly convincing the reasoning in *Raghava Chariar v. Srinivasa Raghav Chariar* (7), which is referred to in some detail in the judgment of the President and which there would be no useful purpose in repeating.

Newbold JA: The facts relevant to this appeal have been set out in the judgment of the President and I find it unnecessary to restate them. The two issues which arise on this appeal are: first, whether the respondent, who was the plaintiff and at the relevant times a minor, can recover a sum for wages due from the appellant under a contract of service; and secondly, if so, whether payment by the appellant to the father of the respondent of the sum so due discharges the appellant. The trial judge on the first issue held that the respondent could recover the sum due under the contract; and on the second issue he held that the appellant had not discharged his liability by paying the sum due to the father.

The first issue raises the question whether a contract to which an infant is a party is absolutely void, with the result that no party thereto would acquire any rights enforceable in the courts by virtue of the contract, or whether in certain circumstances it gives rise to rights enforceable by the infant in the courts. The law of Uganda at the relevant time relating to the rights arising under agreements between parties is contained in the Indian Contract Act, 1872, as applied to Uganda (see Cap. 207). By s. 2 (e) every promise (that is a proposal made by one party and accepted by the other), or set of promises forming the consideration for each other, is an agreement. By s. 2 (g) an agreement not enforceable by law is void and by s. 2 (h) an agreement enforceable by law is a contract. By s. 10 agreements (subject to other irrelevant considerations) are contracts if made by persons competent to contract and by s. 11 persons of full age are (subject to other irrelevant considerations) competent to contract. In my view the joint effect of these sections is such that if an infant is a party to an agreement it is not a contract and the agreement is not enforceable at law and is thus void. It was so held in 1903 by the Privy Council in *Mohori Bibee v. Dhurmodas Ghose* (2), where their Lordships stated (30 I.A., at p. 124):

“The question whether a contract is void or voidable presupposes the existence of a contract within the meaning of the Act, and cannot arise in the case of an infant.”

It is true that the facts of that case were such that it could have been decided the same way on narrower grounds, but the ratio of the decision of the Privy Council was that an agreement to which an infant is a party does not, under the Act, give rise to any rights enforceable in the courts. Whether or not this court is still bound by the ratio of decisions of the Privy Council, in my view that decision does nothing other than set out the law of Uganda as contained in the Act. I do not think it can be disputed that an agreement which is void and unenforceable at law cannot itself give rise to any rights which the courts will enforce. The position as I see it in this appeal is as follows: the agreement was made between an infant and another person; therefore it is void and unenforceable at law; therefore it cannot give rise to any rights which the courts will enforce; therefore the infant cannot enforce his right to any wages under the agreement; therefore this appeal must succeed. I confess I can see no fault in that chain of logic which is

dictated by the clear terms of the statute law of Uganda, quite apart from the ratio of any decision of the Privy Council. The trial judge, in arriving at a different conclusion, followed what he understood to be the effect of a previous decision of Bennett, J., given in *Girdharlal N. Tejura v. Bhagwanji Lalji Ltd.* (1), and also the English case of *Doyle v. White City Stadium* (16). Dealing first with the English case, all that I need say is that the law of England is quite different; save in cases to which the Infant's Relief Act, 1874, applies, a contract to which an infant is a party is voidable and not void. As regards *Tejura's* case (1) it would seem that Bennett, J., followed the commentary of an Indian textbook and held that an infant who had given value could recover on a quasi-contract under s. 70. That case is not under appeal, nor is the nature of the pleadings in it known, but I do not understand the judge to have held that an agreement to which an infant is a party is enforceable. If he so held I consider that such is not the law; in any event I consider that para. (1) of the headnote in so far as it suggests that an agreement to which an infant is a party is enforceable is not in accord with the judgment and it should be changed. As *Tejura's* case (1) is not, in my opinion, a decision to the effect that an agreement to which an infant is a party is in certain circumstances enforceable the trial judge erred in saying that in deciding as he did he was following that case. In so far as the trial judge referred to s. 70 I regret I am unable to follow his reasoning or what effect he considered s. 70 had on the facts of this case. Before us the respondent conceded that on the pleadings he could not pray in aid the provisions of s. 70, but he asked leave to argue the point without, however, applying for any amendment of the pleadings. I do not consider that he should be allowed to found any argument on s. 70 as his claim was based on an express contract and thus the appellant was never called on to meet a claim based on the circumstances set out in s. 70 (even if that section does apply in the case of infants) nor was there any evidence of the value of the services rendered for which compensation must be made.

If one has regard to the agreement to which an infant is a party, and to that alone, the effect of the sections to which I have referred and to the decision in *Bibee's* case (2) would seem, in certain circumstances, to work an injustice on an infant who had entered into an agreement. This would be a strange position if, as is generally accepted, the relevant provisions of the Contract Act were designed to give protection to infants. For this reason the courts in India have steadily eroded the principle of the decision in *Bibee's* case (2). In effect, the Indian courts have assimilated the infant's position under English law with his position under the Indian Contract Act and have treated the infant as being competent to enter into a contract which is voidable. In other words, the contract is good if it is in the infant's favour and if the infant has performed all he is called upon to do under the contract, but in other cases the contract is void. In their decisions to that effect the Indian courts have either not referred to the relevant sections of the Contract Act, or have dealt with the matter as one of quasi contract, or have based an argument upon the fact that the promise of the other party can be the subject of an agreement and as it is that agreement which is sought to be enforced and as the infant is merely the beneficiary under the agreement therefore the agreement is an enforceable contract. That in my view is an attractive but specious argument. It is specious because you cannot have an agreement without two persons being party thereto and the moment one of those persons is an infant the agreement becomes unenforceable and void. Comity demands that I pay regard to the decisions of the Indian courts upon the terms of an Act which is applied to Uganda, but if I am satisfied that those decisions are incorrect I am at liberty to disregard them; I am so satisfied.

The fact, however, that an agreement to which an infant is a party is void does not mean that rights enforceable in the courts can never arise following action taken by either of the parties under the agreement. Though the ultimate result

may be the same in a number of cases, it is quite a different thing to claim on the one hand under a contract of sale the sum of £50 for goods sold and delivered and on the other that goods have been delivered and that they should either be returned or compensation made for them. The Indian Contract Act, as is to be expected following upon the making void of agreements to which an infant is a party, specifically provides, in ss. 65 and 68, for cases where action has been taken under an agreement which is void because one of the parties is an infant. Sections 65 and 68 are as follows:

- “65. When an agreement is discovered to be void, or when a contract becomes void, any person who has received any advantage under such agreement or contract is bound to restore it, or to make compensation for it to the person from whom he received it.”
- “68. If a person incapable of entering into a contract, or any one whom he is legally bound to support, is supplied by another person with necessaries suited to his condition in life, the person who has furnished such supplies is entitled to be reimbursed from the property of such incapable person.”

In my view both these sections apply to agreements to which an infant is a party. The remedy given in s. 68 is by no means co-extensive with that given in s. 65: the one arises only in the case of necessaries being supplied and is against the property of the infant; the other is general and may, subject to any other specific provision, be enforced in any way in which a personal judgment may be enforced. If regard is had to these two sections then a number of the injustices which could arise by reason of an agreement to which an infant is a party being void would be removed. The claim under the sections would not be on the agreement but would be on the equities arising consequent upon the receipt of a benefit; and where the benefit cannot be returned the amount of the compensation might well be different from any figure set out in the void agreement.

It is true that the Privy Council in *Bibee's* case (2) would appear to state that s. 65 does not apply in the case of agreements to which infants are parties. The application of that section was raised for the first time in the argument before the Board and the matter does not appear to have been adequately considered. Their Lordships stated (30 I.A., at p. 124):

- “It is sufficient to say that this section, like s. 64, starts from the basis of there being an agreement or contract between competent parties, and has no application to a case in which there never was, and never would have been, any contract.”

Section 64 relates to voidable contracts, that is contracts which are good until avoided, and must therefore have been made by parties competent to contract. Section 65 on the other hand draws a specific distinction between agreements discovered to be void and contracts which become void.

This reference to agreements discovered to be void is clearly designed to cover the case of a person, such as an infant, who is not competent to contract with the result that a contract never came into existence; and the words “discovered to be void” merely mean that though *ex facie* the agreement is valid yet on examination of extrinsic circumstances it is ascertained to be void. The statement of their Lordships is obviously made *per incuriam* in relation to a point raised incidentally at the last moment and I do not consider that I am bound by it. It would thus, in my opinion, have been open to the respondent to base his claim on s. 65 as he had rendered services (which could not be restored) and the appellant would have been liable to make what would have to be assessed as a fair compensation for those services. However he has failed to do so and it is thus unnecessary to

consider the matter further. I have, however, referred to ss. 65 and 68 in order to draw attention to the point that injustice is not necessarily worked by reason of an agreement with an infant being void.

As in my view the appellant is unable to succeed on his claim as framed it is unnecessary to consider the second issue raised in the appeal. It would seem, however, that by reason of s. 183 of the Indian Contract Act the father could not have received the money as agent for the infant. If therefore the receipt by the father is to be a valid discharge of the liability of the appellant it must be based on the father's powers as guardian of the child. Whether the English distinction, which stems from the feudal system, between guardianship of the person as opposed to that of the property is appropriate to wholly different social systems I leave for consideration on another occasion. Though the English common law and statutes of general application as at a specified date are applicable to Uganda, they are applicable "so far only as the circumstances of the Protectorate and its inhabitants . . . permit, and subject to such qualifications as local circumstances render necessary."

For these reasons I would allow the appeal with costs, set aside the judgment and decree of the High Court and substitute therefore a decree dismissing the plaint with costs.

Appeal dismissed.

For the appellant:

Wilkinson & Hunt, Kampala

P. J. Wilkinson Q.C. and M. P. Vyas

For the respondent:

Manubhai Patel & Son, Kampala

M. C. Patel

Sesiriya Nakanwagi v Kyagwe Motor Spares [1964] 1 EA 41 (HCU)

Division:	High Court of Uganda at Kampala
Date of judgment:	9 January 1964
Case Number:	57/1963
Before:	Bennett J
Sourced by:	LawAfrica

[1] Practice – Appeal – Right of appeal – Order made by District Court – Order transferring suit to Principal Court – Appeal to High Court from order made – Whether appeal competent.

Editor's Summary

A District Court made an order under s. 7 of the Buganda Courts Ordinance transferring a civil suit to which both parties were Africans to the Principal Court of Buganda. On appeal to the High Court against that order it was common ground that no formal order giving effect to the decision of the District Court had ever been drawn up.

Held.—

- (i) an order of transfer of a suit under s. 7 of the Buganda Courts Ordinance is not an “order made under rules” within the meaning of s. 77(1)(h) of the Civil Procedure Ordinance and is not appealable by virtue of anything contained in the Civil Procedure Ordinance or rules made thereunder;
- (ii) since the Buganda Courts Ordinance did not provide for appeals from orders made under s. 7 of that Ordinance there was no right of appeal from the order of the District Court;
- (iii) in any event the appeal was incompetent and should be struck out because no formal order giving effect to the decision of the District Court had ever been drawn up.

Appeal struck out.

Case referred to in judgment:

(1) *Old East African Trading Co. Ltd. v. Jetha* (1956), 23 E.A.C.A. 264.

Judgment

Bennett J: This is an appeal from an order of the District Court of Mengo whereby a civil suit to which both parties were Africans was transferred to the Principal Court of Buganda under s. 7 of the Buganda Courts Ordinance, Cap. 77.

It is unnecessary to consider the nature of the plaintiff's claim or the reasons for the learned magistrate's decision, since it appears to me that this appeal is incompetent.

Appeals from the orders of district courts to the High Court in civil matters are regulated by ss. 77 to 82 of the Civil Procedure Ordinance, Cap. 6. Section 77(1) provides that no orders shall be appealable other than those specifically described in the subsection, or from which an appeal is provided for by any other law. It is plain that an order of transfer under s. 7 of the Buganda Courts Ordinance does not fall within any of the categories of orders specified in s. 77(1). Sub-paragraphs (a) to (g) of s. 77(1) particularise the orders which are appealable, and sub-paragraph (h) reads:

“Any order made under rules from which an appeal is expressly allowed by rules.”

Effect is given to s. 77(1)(h) by Order 40, r. 1. Sub-rule (1) of that rule sets out a comprehensive list of orders which are appealable as of right. Sub-rule (2) reads:

“An appeal under these rules shall not lie from any other order save with leave of the court making the order or of the court to which an appeal would lie if leave were given.”

Sub-rule (2) must be read subject to s. 77(1)(h), and when so read it is clear that the word “order” in sub-r. (2) must be construed as meaning an order made under the Civil Procedure Rules. This is because in s. 77(1)(h) the word “rules” must be construed with reference to the definition of that word in s. 2 of the Civil Procedure Ordinance, which reads:

“‘rules’ means rules and forms made by the Rules Committee to regulate the procedure of courts.”

An order of transfer under s. 7 of the Buganda Courts Ordinance is not an “order made under rules” within the meaning of s. 77(1)(h) of the Civil Procedure Ordinance. It follows that it is not appealable by virtue of anything contained in the Civil Procedure Ordinance or rules made thereunder. One would expect that the Buganda Courts Ordinance itself would make provision for appeals from orders made under s. 7 of that Ordinance, but it does nothing of the kind. In these circumstances I am of the opinion that there is no right of appeal from the order against which it is sought to appeal.

There is, however, another reason why this appeal is incompetent, namely, that no formal order giving effect to the Magistrate's decision has ever been drawn up. The Civil Procedure Ordinance only gives a right of appeal against decrees and orders. In s. 2 of the Ordinance “order” is defined as “the formal expression on any decision of a civil court which is not a decree, and shall not include a rule nisi.” The failure to have a formal order drawn up is fatal to the appeal.

In *Old East Africa Trading Co. Ltd. v. Jetha* (1) (23 E.A.C.A., at p. 266), Briggs, Ag. V.-P. said:

“The penultimate error of the appellants’ former advocate was to neglect the elementary step of extracting the order of December 20 before lodging his appeal. This court has given warning after warning during the last few years against this plain breach of duty, which has repeatedly led to the dismissal in limine of potentially successful appeals.”

That was an appeal from the High Court of Tanganyika.

In Uganda, Order 18, r. 7 places the duty of drawing up the decree or order of a subordinate court upon the judge who pronounced it. Nevertheless the fact remains that unless a decree or order is drawn up by the judge there is nothing against which to appeal.

For these reasons I am of opinion that this appeal is incompetent and it is struck out.

The appellant is ordered to pay the respondent’s costs.

Appeal struck out.

For the appellant:

Shah Patel & Co., Kampala

N. J. Shah

For the respondent:

R. R. Shah, Kampala

Field v Field
[1964] 1 EA 43 (CAN)

Division:	Court of Appeal at Nairobi
Date of judgment:	4 February 1964
Case Number:	28/1963
Before:	Sir Trevor Gould Ag P, Crawshaw Ag VP and Crabbe JA
Sourced by:	LawAfrica
Appeal from:	The Supreme Court of Kenya – Kennedy, J.

[1] Divorce – Domicil – Petition by wife – Abandonment of domicil of origin by husband – Acquisition of domicil of choice – Allegation by wife that husband domiciled in Kenya disputed by husband – Standard of proof required – Extent of onus on wife – Husband a tenant farmer – Declaration of intention not to return to England – No evidence given by husband.

Editor’s Summary

The appellant petitioned for dissolution of her marriage with the respondent alleging that the matrimonial

domicil was Kenya, and gave evidence that the respondent was born in England and his domicil of origin was in England; that in 1959 the respondent sold all his assets including his house in England; that he came to Kenya in June 1959 and became a tenant farmer under the Settlement Board; that the respondent had declared many times his intention not to return to England in any circumstances and his desire to stay in Kenya. The question of domicil was put in issue by the respondent in his answer and by agreement the issue was tried separately. After the appellant had given evidence counsel for the respondent stated that he was not calling any evidence. The trial judge held that the respondent had abandoned his domicil of origin but he was not satisfied that the appellant had proved with “perfect clearness” that she had a Kenya domicil. On appeal it was argued that the trial judge had required too high a standard of proof and that he had erred in his appreciation of the evidence.

Held – the judge had erred in his evaluation of the evidence and the change of domicil had, in all the circumstances of the case, been established with clarity.

Appeal allowed.

Cases referred to in judgment:

- (1) *Santhumayor v. Santhumayor Ferris & Another*, [1959] E.A. 204 (U.).
- (2) *Winans v. Attorney-General*, [1904] A.C. 287; [1904] All E.R. Rep. 410.
- (3) *Hopkins v. Hopkins*, [1950] 2 All E.R. 1035.
- (4) *Bater v. Bater*, [1950] 2 All E.R. 458.
- (5) *Hornal v. Neuberger Products Ltd.*, [1956] 3 All E.R. 970.
- (6) *Zimbler v. Zimbler* (1948), 15 E.A.C.A. 10.
- (7) *Re Marrett, Chalmers v. Wingfield* (1887), 36 Ch. D. 400.
- (8) *Benmax v. Austin Motor Co. Ltd.*, [1955] A.C. 370; [1955] 1 All E.R. 326.

Judgment

Sir Trevor Gould Ag P, read the following judgment of the court: The appellant filed in the Supreme Court of Kenya a petition for dissolution of her marriage with the respondent, alleging that the matrimonial domicile was in Kenya. The question of domicile was put in issue by the respondent in his answer and by agreement the issue was tried separately. The learned judge, correctly putting the onus on the appellant, held that he was not satisfied that she had –

“proved that she had a Kenya domicile at the time when the petition was presented with that degree of ‘perfect clearness’ which is the established standard of proof required.”

The petitioner appealed to this court and we now give our reasons for allowing the appeal.

The only witness called was the petitioner, the respondent though present in court, electing not to give evidence. The facts proved were: (a) The respondent’s domicile of origin was in England and the marriage took place in England in 1949. (b) The respondent was born in England and lived there, except for service in the Merchant Navy, until 1959. (c) In that year the respondent read about settlement schemes in Kenya, made up his mind to go there, sold his house, furniture and car and took the appellant and the two children of the marriage to Kenya, arriving in June, 1959. The respondent had no other property in England or elsewhere. (d) The respondent attended a course of nine months’ duration at Egerton School of Agriculture, the appellant meanwhile living with him at the college but having taken employment. (e) As from August 1, 1960, the respondent became a tenant farmer under the Settlement Board and the petitioner lived with him on the farm until June 28, 1961. The respondent paid rent for the farm but bought the machinery – he is still on the farm. (f) At the date of the hearing of the petition the elder child of the marriage was at a boarding school in Nairobi and the younger attended primary school in Nakuru.

On the question of the intention of the respondent to remain permanently in Kenya the appellant said:

“After we arrived in Kenya respondent told me he would not go back to U.K., under any circumstances and wanted to stay in Kenya. He has said that many times to me and to other people.”

The following passage of the judgment under appeal contains the reasoning of the learned judge leading to his decision that Kenya domicile had not been proved:

“I do not find this an easy point to decide. The burden of proof is not a light one. The fact of the respondent’s

abandonment of his domicil of origin is clear and the fact of his residence in Kenya is amply proved. But, as was said in *Santhumayor's* case (1), he does not seem to have taken any of the

steps which the English cases point to as evidence of intention. He has bought no land here – but leased it, although he had apparently £6,000 available. The petitioner has testified that he declared his intention of not returning to England and of wanting to stay in Kenya but such statements, if they were made, do not carry any very great weight.”

It was argued by counsel for the appellant that the learned judge had required too high a standard of proof and that he had erred in his appreciation of the evidence. In using the phrase “perfect clearness” in relation to onus the learned judge was following a similar reference in the judgment of the Chief Justice of Uganda in *Santhumayor v. Santhumayor Ferris & Another* (1) ([1957] E.A: 4, at p. 206), in which it was said that standard was required by the English cases. There is ample authority for that statement and it is necessary only to quote the following passage from the speech of Lord MacNaghten in *Winans v. Attorney-General* (2), ([1904] A.C., at p. 292):

“My Lords, if the authorities I have cited are still law, the question which your Lordships have to consider must, I think, be this: Has it been proved ‘with perfect clearness and satisfaction to yourselves’ that Mr. Winans had at the time of his death formed a ‘fixed and settled purpose’ – ‘a determination’ – ‘a final and deliberate intention’ – to abandon his American domicil and settle in England?”

Counsel for the appellant relied on *Hopkins v. Hopkins* (3), the headnote of which in The All England Report contains the following passage:

“Held –

- (i) where a wife, in her petition for divorce, alleged that the husband was domiciled in England, the onus was on her to make out a prima facie case in support of the allegation, but if, through no fault of hers, the evidence was scanty, she had discharged her burden, provided that the facts proved tended rather to show that the court had jurisdiction than that it had not.”

That was a High Court decision which could do nothing to lessen the authority of *Winans v. Attorney-General* (2) but it is in any event distinguishable; what was being considered in the part of the judgment giving rise to the passage quoted from the headnote, was proof of a domicil of origin, and not the acquisition of a domicil of choice. It is proof of the acquisition of a domicil of choice with which the court is concerned in the instant case and it was in relation to that question that the reference in *Winans’* case (2) was made. We do not find that the learned judge in the Supreme Court misdirected himself on the question of onus though the meaning to be attached to the phrase “with perfect clearness” may be a matter of opinion. In our opinion the problem merely presents another illustration of what was referred to by Denning, L.J. (as he then was) in *Bater v. Bater* (4), ([1950] 2 All E.R., at p. 459) and in *Hornal v. Neuberger Products, Ltd.* (5), ([1956] 3 All E.R., at p. 973) to the effect that the standard of proof depends in some measure on the seriousness of the allegation. A change from a domicil of origin to one of choice is always a serious matter and the standard required is accordingly a high one.

We turn now to the effect of the evidence in the present case and on this question we took a different view from that expressed by the learned trial judge. In the passage from the judgment above quoted the words, “The fact of the respondent’s abandonment of his domicil of origin is clear . . .”, were criticised by counsel for the appellant as being inconsistent with the finding that no domicil of choice had been acquired. It is, of course, clear law that unless a domicil of choice is acquired the domicil of origin remains – a person cannot be without a domicil. It may be that what the learned judge intended to convey was that England had been abandoned as a permanent home and therefore it depended

upon the respondent's intention in relation to Kenya whether a domicile of choice was acquired there or whether the domicile of origin survived by operation of law. That would be quite correct, but we think that the learned judge's view that all intention of further residence in England had been abandoned is one which ought to have influenced him in his assessment of the quality of the respondent's residence in Kenya.

On that question we think that, if a man has permanently left his original home it is more likely that he intends to remain in the country in which he settles. He may, of course, intend only, in a familiar phrase, "to try out" the new country, but if he has abandoned his original home he is less likely to try out further new countries with consequent loss and expense. This applies particularly to a man of moderate resources such as the respondent. His position was very different from that of the testator in *Winans v. Attorney-General* (2) who left a fortune of "two or three millions in marketable securities" part of which was in the United States, his domicile of origin. The respondent in the instant case had realised all his English assets and invested the proceeds in a farm in Kenya, admitting in his answer that he was dependent upon income from the farm. The learned trial judge made the point that the respondent did not buy the farm "although he had apparently £6,000 available" but leased it. The £6,000 received from English assets had presumably been diminished to some extent by expenses and the cost of a motor car purchased on arrival in Kenya, and the un rebutted evidence of the appellant was that the respondent did not have enough money to be an assisted owner. In an affidavit incorporated by reference into the answer the respondent stated that he had put his life savings into the farm, and we consider it clear from the evidence and the pleadings that all the respondent had was invested in Kenya to the same extent as if he had been a purchaser instead of a lessee.

At one stage of his judgment, in distinguishing from the present the case of *Zimble v. Zimble* (6), the learned trial judge stressed that *Zimble's* case (6), was one of a petitioner who gave evidence of his acquisition of a domicile of choice and he said – ". . . and who better to testify to his animus manendi than the man who formed the animus." In our view that basis of differentiation has little validity in the light of the attitude of the respondent (by his counsel) in the present case. After the appellant had given evidence, including that of repeated declarations by the respondent of his intention not to return to England and his desire to stay in Kenya, counsel for the respondent is recorded as saying: "No evidence. Don't intend to call any evidence. Waste of time – only minor differences in the two stories". That can only be an acceptance of the truth on material points of the appellant's evidence including that of the declarations of intention made by the respondent. If the respondent had wished to challenge or explain them it was open to him to do so and we do not see any good reason why the learned judge should not have accepted the evidence of those declarations in toto instead of in part as he appears to have done.

Counsel for the respondent based a submission upon a sentence in the evidence of the appellant which reads: "Respondent did talk of Australia but only two months ago". Counsel relied on that as tending to negative a fixed intention to remain in Kenya. Counsel for the appellant, who appeared in the Supreme Court, stated from the bar that the question to the witness (which is not recorded) had relation to the contingency of the respondent being forced to leave Kenya. The fact that the learned judge made no reference to that passage in his judgment tends to confirm that the question was of the nature indicated and that the learned judge did not consider it as a factor tending to negative animus manendi. That being so, in our view the evidence can, at most, relate to a subsequent fluctuation of opinion, dealt with by Bowen, L.J., in the following passage of his judgment in *Re Marrett, Chalmers v. Wingfield* (7), (1887), 36 Ch. D., at pp. 408-409):

“But when you have once arrived at the conclusion that there has been a fixed and settled intention of permanently residing in a new place, coupled with an actual residence in that new place, then the change of domicile is effected, and change of domicile once effected will not be undone by mere subsequent fluctuations of opinion on the part of the settler as to whether his choice of the new residence has been wise, or by expressions which lead one to think that he entertained vague and floating ideas of going to reside elsewhere.”

In our judgment the learned judge in the Supreme Court erred in his evaluation of the evidence and we were ourselves satisfied that change of domicile had, in all the circumstances of the case, been established with sufficient clarity. We appreciate that the determination is one of fact but there was no contest as to primary facts and no question of credibility arose. We were therefore in as good a position as was the trial court to determine the effect of the evidence, and were guided by the principles expressed in *Benmax v. Austin Motor Co. Ltd.* (8). The appeal was accordingly allowed with costs in this court and in the Supreme Court and the trial of the other issues was directed to proceed.

Appeal allowed.

For the appellant:

Lawrence Long & Co., Nakuru

Lawrence Long

For the respondent:

Geoffrey White & Co., Nakuru

Sir William Lindsay

**Abdulrehman Haji Suleman & Others v Bhadurali Khetshi Hansraj &
another**

[1964] 1 EA 47 (CAM)

Division:	Court of Appeal at Mombasa
Date of judgment:	5 February 1964
Case Number:	82/1962
Before:	Wicks J
Sourced by:	LawAfrica

(Reference on taxation under r. 6(2) of the Eastern African Court of Appeal Rules, 1954, from the Registrar's decision)

[1] *Costs – Taxation – Appeal – Instructions fee – Notice that grounds of appeal will not be argued – Preparation of case stopped – Assessment of instructions fee.*

Editor's Summary

Before the hearing of an appeal the appellants' advocates wrote to the respondents' advocates that they would not be arguing the substantive grounds of appeal because the subject matter, a mortgage, would then have been redeemed and that only the question of the costs of the suit in the Supreme Court would be argued. Subsequently the Taxing Officer taxed Shs. 12,000/- off the instructions fee of Shs. 15,000/- claimed in the appellants' bill of costs. On reference to a judge under r. 6(2) of the East African Court of Appeal Rules, 1954,

Held –

- (i) where, prior to the hearing of the appeal, notice is served that only a small part of the appeal will be argued, the instructions fee should be assessed on the basis of the work actually done by the time the notice is served;
- (ii) work on the substantive part of the appeal was stopped before any work had been done on it and the fee allowed by the Taxing Officer was assessed on correct principles and was adequate in amount.

Appeal dismissed.

Cases referred to in judgment:

(1) *Harrison v. Leutner* (1881), 16 Ch. D. 559.

Judgment

Wicks J: This is an appeal against the ruling of the taxing master who taxed off Shs. 12,000/- in respect of an instruction fee claimed in the sum of Shs. 15,000/-.

It is not disputed that the substantive grounds of the appeal were not argued, and this is seen from the opening sentence of the judgment of the Court of Appeal which was:

“This appeal, as it has developed, relates solely to the order for costs made by the trial judge.”

The guiding principle governing the assessment of costs in the case of abandoned appeals, as appeals in which grounds of appeal are not argued, is *Harrison v. Leutner* (1), in which the court called for a reply from the taxing masters and approved that reply, the relevant part of which is:

“We have always acted on the principle that costs of all work in preparing, briefing or otherwise relating to affidavits or pleadings, reasonably and properly and not prematurely done, down to the time of any notice which stops the work, is allowable and that the taxing master, having regard to the circumstances of each case, must decide whether the work was reasonable and proper and the time for doing it had arrived.”

In his ruling the taxing master referred to a letter dated May 8, 1963, sent by the advocate for the appellant to the advocate for the respondent. The relevant parts of this letter are:

“With regard to the appeal, as the mortgage will have been redeemed we take it that the only matter to be argued in the appeal will be the question of the costs of the mortgage suit in the Supreme Court, as contained in paras. 1-4 of the memorandum of appeal and that the grounds for the appeal in para. 5 of the memorandum will not now be argued.

We shall be glad if you will confirm by return to avoid unnecessary preparation of the appeal and resultant costs.”

It is not disputed that the mortgage was redeemed and all that the appellant sought to attain by his letter, part of which I have set out, he did attain. Counsel for the appellant submits that the work in respect of which an instruction fee is provided is done immediately after a memorandum of appeal is served on him, and that grounds of appeal are abandoned later does not affect the work done. There is no doubt that this is so in a case where there is no notice of abandonment before the appeal is heard, but as was laid down in *Harrison's* case (1) the factor is work actually done down to the time when a notice stops the work. In the case before me, it is clear from the appellants' letter, that the appellant himself asks that a ground of appeal should not be argued. His reasons for doing this is not important but it seems in this case to be simply that the mortgage being redeemed, the dispute over the rights to foreclosure become academic with the result that it would have been waste money arguing it. The appellant went further and said – agree to this and it will avoid preparation of the appeal which is for practical purposes unnecessary. Having made the offer which was accepted and which was directly linked to the saving of costs, the appellant cannot now be heard to say, now that he has an order for costs, give me those costs as if our agreement had never been made. The circumstances of this case were that work

on the substantive part of the appeal was stopped before any work had been done on it, the hearing took only one and a half hours and the fee allowed by the taxing master was assessed on correct principles and was adequate in amount.

The appeal is dismissed with costs.

Appeal dismissed.

For the appellants:

Satchu & Satchu, Mombasa

J. E. L. Bryson and *A. C. Satchu*

For the respondents:

Ram Hira, Mombasa

Aden Port Trustees v Ahmed Saleh El-Waha Ishi [1964] 1 EA 49 (CAA)

Division:	Court of Appeal at Aden
Date of judgment:	25 February 1964
Case Number:	83/1963
Before:	Crawshaw, Newbold and Crabbe JJA
Sourced by:	LawAfrica
Appeal from:	The Supreme Court of Aden – Goudie, J.

[1] *Damages – Trespass – Continuing trespass – Dumping of scrap on land – Action for injunction and damages – Damages claimed from date of filing proceedings till removal of scrap – Injunction granted – Whether plaintiff entitled to damages for period after filing suit.*

[2] *Trespass – Continuing trespass – Dumping of scrap on land – Action for injunction and damages – Damages claimed from filing of suit till removal of scrap – Injunction granted – Whether plaintiff entitled to damages for period after filing suit.*

Editor's Summary

The appellant owned a foreshore upon which for some years the respondent had dumped scrap under licence from the appellant. The appellant terminated this licence on August 15, 1960 and on April 27, 1961 filed a suit for an injunction restraining the respondent from continuing the trespass and “obstruction fees” by way of damages at the rate of Shs. 115/- per week from November 5, 1960 to the date of filing of suit and further damages at the same rate from that date until removal of the scrap. The

plaint alleged a continuing cause of action so long as the trespass continued. The judge granted the injunction and awarded Shs. 40/- nominal damages. On appeal against the quantum of damages,

Held –

- (i) the appellant was seeking damages in respect of causes of action which did not exist when the suit was filed and damages in respect of causes of action which might arise after judgment; in the absence of legislative provision enabling damages to be given in respect of a cause of action arising after commencement of the suit, all that can be recovered are damages to compensate for the injury which resulted from the cause of action, or causes of action, in respect of which the suit has been brought;
- (ii) in any event the damages sought were in the nature of special damages and they should have been so pleaded and strictly proved.

Appeal dismissed.

Cases referred to in judgment:

- (1) *Konskier v. Goodman (B.) Ltd.*, [1928] 1 K.B. 421; [1927] All E.R. Rep. 187.

(2) *Leeds Industrial Co-operative Society Ltd. v. Slack*, [1924] A.C. 851; [1924] All E.R. Rep. 259.

Judgment

Newbold JA, read the following judgment of the court: This was an appeal by the plaintiff against the quantum of damages awarded to him by the Supreme Court in a suit based on trespass. On the termination of the hearing we dismissed the appeal with costs and stated that we would give our reasons in writing, which we now do.

The relevant facts were that the appellant was the owner of part of the Maalla foreshore upon which for a number of years the respondent had dumped scrap. The respondent alleged that the scrap was dumped with the licence of the appellant and that a fee was paid for such licence. The trial judge held that a licence had been granted but had been terminated on August 15, 1960. In a letter dated November 23, 1960, the appellant demanded payment of the licence fees for the period up to November 5, 1960. The finding of the trial judge on the effect of this letter is not clear and was the subject of dispute on the appeal. The respondent submitted that the judge had found that this letter had waived the notice of August 15, 1960, terminating the licence, that as a result the respondent was lawfully using the foreshore up to the date of the filing of the suit by reason of a licence which had been reinstated and that as no cause of action existed on the filing of the suit the appellant was not entitled to any damages. This was in effect an argument on a cross appeal. No notice of cross appeal had been given and we refused to allow a cross appeal at that late stage. The appellant submitted that the trial judge had found that the letter of November 23, 1960, had not waived the previous notice terminating the licence but that even if it had the licence was terminated by the institution of the suit. The judgment of the trial judge is not very clear, but as we arrived at our decision for other reasons we find it unnecessary to pursue this aspect of the matter though we would point out that if in fact the respondent was using the land with the licence of the appellant at the date the suit alleging trespass was filed it is a little difficult to see what cause of action in trespass existed on the filing of the suit and, consequently, how the appellant on such suit could be entitled to any damages.

The appellant filed a suit on April 27, 1961, claiming an injunction restraining the respondent from continuing the trespass and “obstruction fees by way of damages for the continued trespass” at the rate of Shs. 115/- per week from November 5, 1960, up to April 27, 1961, and further damages at the rate of Shs. 115/- per week from the date of filing the suit till the date of removal of the scrap. The plaint stated that the cause of action “is a continuing cause of action so long as the trespass continues”. The rate of Shs. 115/- per week was arrived at on the basis of an “obstruction fee” of Shs. 5/- per 1,000 square feet used per week.

Evidence was given that on March 16, 1961, that is shortly before the suit was filed, the area used by the respondent was 23,086 square feet and that on April 1, 1963, it was 15,890 square feet. Apart from this evidence there was no evidence of what area was used subsequent to the filing of the suit, though it would appear that some area was used and that it fluctuated. We were informed, though the record does not clearly show this, that the respondent paid and the appellant accepted the amount claimed by way of “damages” for the alleged trespass up to the date of the filing of the suit. The trial judge granted the injunction and awarded to the appellant Shs. 40/- as nominal damages, though it is not clear in respect of what trespass the nominal damages were awarded.

From that award the appellant appeals and asks that this court increase the

damages by awarding damages at the rate of Shs. 5/- per 1,000 square feet in respect of 23,000 square feet being used each week from the date of the filing of the suit until judgment (though on the hearing the appellant stated he would accept a utilisation area of 16,000 square feet) and thereafter at the same rate until the scrap is removed.

Assuming that there was a trespass when the suit was filed, then a fresh cause of action arises *de die in diem* as the trespass continues (see *Konskier v. B. Goodman Ltd.* (1)). The general rule is that damages are compensation awarded for the loss arising from the cause of action in respect of which the suit was filed. A continuing trespass must be distinguished from a trespass whose consequences continue. In the latter case damages are awarded once and for all and the prospective consequences of the injury are taken into account because they flow from the trespass which was the cause of action. What, however, the appellant was seeking in this case was damages in respect of causes of action which did not exist when the suit was filed and damages in respect of causes of action which might arise after judgment. This he cannot have. In the absence of legislative provision enabling damages to be given in respect of a cause of action which arises after the commencement of the suit, all that can be recovered are damages to compensate for the injury which resulted from the cause of action, or causes of action, in respect of which the suit was brought (see *Leeds Industrial Co-operative Society, Ltd. v. Slack* (2)). In the case of a continuing cause of action, such as the trespass alleged in this case, in England by virtue of the provisions of Order 36B, r. 7, specific power is given to assess damages down to the time of assessment. No similar provision in Aden was brought to our attention, though under r. 228 of the Rules of Court power is given in an action for recovery of possession of immoveable property to direct an enquiry as to mesne profits from the institution of the suit until delivery of possession subject to a limit of three years from the date of the decree. In England, by virtue of provisions originally introduced by Lord Cairns Act, 1858, the court may, in the case of a continuing cause of action as in this case, instead of granting an injunction make an award of damages. Such an award would be in respect of damage from causes of action which would arise subsequent to the institution of the suit and thus, in effect, the purchase price of the right to commit the tort in perpetuo. As was pointed out in the *Leeds* case (2) such a power would be very sparingly exercised by the courts and in any event the position does not arise here as the trial judge granted the injunction sought.

For these reasons we considered that the appellant was not entitled to the damages sought and we dismissed the appeal. In any event we would point out that the damages sought are in the nature of special damages and that special damages must not only be pleaded but strictly proved. We would not consider evidence of the utilisation of 15,890 square feet during one day in a period of over two years sufficient evidence to justify an award of damages related to the utilisation of 23,086 (or 16,000) square feet for the whole of such period. We would also point out that this obstruction fee is nothing other than a licence fee for a licence to dump scrap and we would endorse the remarks of the trial judge of the advisability of a landowner drawing by his acts a clear line between a utilisation under licence and a trespass.

Appeal dismissed.

For the appellant:

P. K. Sanghari, Aden

For the respondent:

R. Rheman, S. N. Iyer and A. Rahman, Aden

Roshanali Nazerally & another v Income Tax Commissioner
[1964] 1 EA 52 (SCK)

Division: Supreme Court of Kenya at Mombasa
Date of judgment: 5 February 1964
Case Number: 14/1962
Before: Wicks J
Sourced by: LawAfrica

[1] Costs – Taxation – Apportionment – Ten appeals – One chosen as test case – Instructions fee – Parties same in each appeal – Decision in test case to govern fate of all – Appeal allowed – Assessment of instructions fee.

Editor's Summary

The appellants had filed ten appeals against decisions of the Local Committee upon ten income tax assessments, each of which related to a different year of assessment. At the hearing it was agreed between the parties, with the approval of the court, that one appeal should be heard as a test case, the decision upon which should govern all the appeals. The appeal having been allowed, the appellants filed a bill of costs for taxation claiming Shs. 30,000/- as instructions fee and Shs. 7,500/- as getting up fee. At taxation it was submitted for the appellants that the instructions fee represented the fee for instructions in all the other cases in respect of which only a nominal instructions fee was claimed. The taxing officer taxed Shs. 27,000/- off the instructions fee and Shs. 6,750/- from the getting up fee, thereby allowing the minimum amount specified in Schedule VI(1)(f) of the Remuneration of Advocates Order, 1962, on the ground that as no orders for costs had been made in the other appeals he could not take these into consideration and would treat each such appeal separately for the purpose of assessing costs. On appeal,

Held –

- (i) where one of a number of cases has by agreement of the parties been made a test case the costs must be apportioned between all the cases;
- (ii) the taxing officer acted properly in refusing to take into consideration the other nine appeals, but it was not correct to treat this appeal separately or to propose to do the same with the other nine appeals, for that would be against the principle of apportionment of costs where one of a number is treated as a test case;
- (iii) a test case is quite different from a case which stands on its own; in a test case, for the purpose of costs, a party is justified in considering the value of the subject matter in dispute to be the total in all the cases; accordingly the taxing officer in assessing the instructions fee and the getting up fee of the test appeal should have taken into account the total subject matter of the ten appeals;
- (iv) the taxing officer should have refused to tax the bill of costs on the ground that, being a test case, the other cases affected should also be before him for the purpose of apportioning the costs;

- (v) as the appellants would have been justified in engaging leading counsel for the appeal, the taxing officer would be justified in the exercise of his discretion to allow an instructions fee and getting up fee well in excess of the minimum of Shs. 5,000/- which the total subject matter of the ten appeals would attract.

Order that the bill of costs be referred back to the taxing officer.

Cases referred to in judgment:

- (1) *Oppenshaw v. Whitehead* (1854), 9 Exch. 384.

(2) *Boguslawski v. Gdynia Ameryka Linie* (No. 2), [1951] 2 K.B. 328; [1951] 2 All E.R. 113.

Judgment

Wicks J: This is an objection to the decision of the taxing officer.

The case was an appeal from the decision of the Local Committee for Mombasa area in respect of an Income Tax Assessment for the year 1946. There were nine other appeals, each between the same parties, but each relating to a different year of assessment.

At the hearing of the appeal it was agreed by counsel for the parties, and approved by the court, that this case should be a test case and judgment in the other cases should follow. The appeal was allowed.

In his bill of costs the successful appellant claimed an instruction fee of Shs. 30,000/- and a getting up fee of Shs. 7,500/-, in respect of which the taxing master taxed off Shs. 27,000/- and Shs. 6,750/- respectively, the fee allowed in each case being the minimum provided for under The Remuneration of Advocates Order, 1962, Schedule VI(I)(f) for a case where the value of the subject matter was Shs. 72,474/-. In his ruling the taxing officer said:

“I might note that Mr. Cleasby tried to justify this amount for instruction on the ground that it represented the instructions in all other cases in which he claims nominal instruction fees. In my opinion this position cannot obtain as there is no order for costs endorsed in the other files. I think the other cases will have to be treated separately for the purpose of instruction fees which course will no doubt yield the expected quantum of remuneration. In the meantime I do not propose to consider the other cases as the bills of costs filed therein are premature and therefore incompetent. Fresh bills had to be filed therein after the judgments and orders for costs are endorsed and signed by the learned judge.”

In all the cases I can find relating to costs in test cases or consolidated actions the plaintiff in each of the cases is a different person, for instance each of five sailors bring an action against a shipping company and one action is made a test case, or the five actions are consolidated. The circumstances in the case before me are unusual in that the plaintiff and defendant are the same in all ten actions, although there is but one cause of action, and is an exception to the general rule laid down in Order 2, r. (1) of the Civil Procedure (Revised) Rules, 1948, which provides that every suit shall include the whole of the claim which the plaintiff is entitled to make in respect of the cause of action. The reason for the exception is that under the East African Income Tax (Management) Act 1958 (No. 10 of 1958) each assessment is a distinct matter and perforce a person objecting to assessments for ten separate years must make ten separate appeals. In the result ten actions having properly been brought and, by agreement of the parties, one made a test case, the costs must be apportioned.

When the case came before the taxing officer judgment had not been delivered in the other nine cases, nor had orders for costs been endorsed. In his ruling it is seen that the taxing master has said:

“I think the other cases will have to be treated separately for the purpose of instruction fees which course will no doubt yield the expected quantum of remuneration.”

If by “expected quantum” is meant the minimum fees in each action, that is a total of Shs. 27,000/- and Shs. 7,500/-, that does not seem to be the law. Such a

proposition was suggested in the case of *Oppenshaw v. Whitehead* (1), but doubt was thrown on it in the case of *Boguslawski v. Gdynia Ameryka Linie* (No. 2) (2) when Denning, L.J. said ([1951] K.B., at p. 334):

“I cannot myself imagine that the solicitor would be entitled to get paid money three times over for the same work because he had won the three actions. I know that in *Oppenshaw v. Whitehead* (1) the Court of Exchequer, consisting of Pollock, C.B., Parke and Alderson, BB., decided that, where two actions had been fought and won on substantially the same ground for two plaintiffs, the attorney is entitled to the same charges as if two different attorneys had been employed, in other words, that he gets paid twice over. That is not a decision of the Exchequer Chamber, but only of the Court of Exchequer, and is not binding on this court. I should not for myself, as at present advised, be inclined to agree with it; but it does not arise in this case.”

As I have said the costs must be apportioned between all the cases and to do this all ten cases must be before the taxing officer. This can be so only if there has been an order for costs and either a bill of costs or agreed costs in each case and this not having been done the taxing officer acted properly in refusing to take into consideration the other nine cases, but it was not correct to treat this case separately or to propose to do the same with the other nine cases, when taxation of them takes place, for that would not be following the principle of apportionment of costs where one of a number of cases has, by agreement of the parties, been made a test case.

In my view the correct course to have been taken by the taxing officer was to refuse to tax the bill of costs on the grounds that, the case being a test case, the other nine cases must be before him for the purpose of apportionment of costs. To save time and expense I suggested to the parties that I adjourn so that judgment could be entered in the other nine cases and an attempt be made to agree costs in them, which in each case should be for out of pocket expenses, for action actually taken and for a nominal instruction fee and getting up fee. This was done and the parties agreed an instruction fee of Shs. 100/- and a getting up fee of Shs. 25/- in each case. It is now possible to assess the instruction fee and getting up fee in this case on the basis of apportionment.

It would seem that an instruction fee of Shs. 100/- and a getting up fee of Shs. 25/- in each of the other nine cases is reasonable for the amount of work done on each. A test case is quite different to a case which stands on its own; in a test case such as this a party is justified in considering the value of the subject matter in dispute to be the total in the ten actions. Looking at the file in this case I see that this was so considered, counsel having extracted schedules making a complete analysis of the various amounts involved in the ten actions. In my view this is a case where a party would have been justified in engaging leading counsel and as a result the taxing officer would be justified in exercising his discretion and allowing an instruction fee and getting up fee well in excess of the minimum fee of Shs. 5,000/- which the total subject matter of the ten actions would attract. I make it clear, however, that in assessing the value of the work done the minimum fee is not the total of minimum fees for the ten actions.

The matter is referred back to the taxing officer. Respondent to pay costs of the application.

Order that the Bill of costs be referred to the taxing officer.

For the appellants:

Atkinson, Cleasby & Co., Mombasa

A. Wynn Jones

For the respondent:

Manubhai Lallubhai Patel v Maganbhai T Patel and another
[1964] 1 EA 55 (HCU)

Division: High Court of Uganda at Kampala
Date of judgment: 27 January 1964
Case Number: 211/1963
Before: Udo Udoma CJ
Sourced by: LawAfrica

[1] Workmen's compensation – Bar to proceedings – Alternative remedies – Action against employer and stranger for damages – Negligence alleged against both – Compensation previously paid by employer to labour office – No agreement by employee to accept compensation – Plea that action for damages against stranger barred by Workmen's Compensation Ordinance, s. 24(1)(U.).

Editor's Summary

The plaintiff, an employee of the first defendant, who was injured in an accident between a lorry belonging to the first defendant and a car belonging to the second defendant, sued both defendants for general and special damages on the ground that neither would admit liability for negligence. After the plaintiff had been discharged from the hospital and whilst still undergoing treatment, the first defendant paid Shs. 900/- to the Labour Office as compensation for the plaintiff's injuries and this was subsequently paid to the plaintiff. There was no evidence as to how that compensation was fixed nor that the plaintiff had agreed thereto. The defence of the second defendant was that by virtue of s. 24(1) of the Workmen's Compensation Ordinance the plaintiff was not entitled to recover damages since he had already received compensation from the first defendant. The court found that the accident was due to the negligence of the second defendant only and that the compensation paid was not agreed or negotiated between the plaintiff and the first defendant and had been regarded by the plaintiff as an advance to be refunded when he received payment for his injury.

Held –

- (i) the plaintiff had not been paid compensation within s. 16(1) of the Workmen's Compensation Ordinance as the first defendant had not complied with those provisions;
- (ii) the claim before the court was for damages only and not for both damages and compensation;
- (iii) the action against the second defendant was not barred under s. 24(1) of the Workmen's Compensation Ordinance because the payment received by the plaintiff did not fall within the provisions of s. 16(1) of the Ordinance.

Judgment for the plaintiff against the second defendant for Shs. 20,000/-.

Cases referred to in judgment:

- (1) *Hummerstone v. Leary*, [1921] 2 K.B. 664.
- (2) *Lind v. Johnson*, [1937] 4 All E.R. 201.
- (3) *Warren v. King*, [1963] 3 All E.R. 521.

Judgment

Udo Udoma CJ: The claim of the plaintiff against the first and second defendants in this case is for (*a*) special damages amounting to Shs. 11,082/60; and (*b*) general damages for negligence as a result of a collision between a motor lorry and a saloon car.

In the plaint filed the plaintiff alleged that he has had to sue both defendants

jointly and severally because he was unable to obtain admission from either of them as to which of them was liable in negligence in the collision.

In their written statements of defence the first and second defendants have denied liability and negligence. Either of them has blamed the other for the accident. In addition the first defendant pleaded that: (1) under ss. 16(1) and 25(1)(c) of the Workmen's Compensation Ordinance (Cap. 91) the action is barred as the plaintiff has already received compensation in respect of the injury suffered by him; and (2) the hospital expenses the subject-matter of the special damages claimed were paid by him, for which together with Shs. 900/- compensation there should be a set off if the plaintiff succeeds as against him.

Similarly in the second defendant's amended written statement of defence the second defendant also further pleaded: (a) that by virtue of s. 24(1) of the Workmen's Compensation Ordinance the plaintiff is not entitled to recover damages since he has already received compensation from the first defendant; (b) contributory negligence; and (c) right of contribution.

The case of the plaintiff is that in May, 1962 he was in the employ of the first defendant as a transport supervisor. His duty consisted in travelling in lorries loaded with goods to and from various places for delivery of such goods to consignees. It was his duty to see that such goods were duly delivered. His salary was Shs. 300/- per mensem exclusive of subsistence allowance of Shs. 5/- per diem to which he was entitled and which was usually only paid to him whenever he travelled in the due performance of his duties.

On May 26, 1962 the plaintiff says that he was travelling in the normal course of his business from Mbarara to Masaka on a lorry No. URG 370, property of his employer, the first defendant. There was also a turnboy at the back of the lorry. The lorry was driven by Manueri Egesa (D.W.1) the servant of the first defendant; and it was travelling on the left side of the road as one faces Masaka from the direction of Mbarara. The road was straight and clear. At Mile 15 on the Mbarara to Masaka road the lorry was ascending a small hill at a speed of between 25 and 30 m.p.h. when another vehicle, a motorcar No. URW 107, which was then coming towards the lorry in the opposite direction and descending the hill at a speed of between 50 and 60 m.p.h., suddenly swerved from the right side of the road as one faces Masaka and collided with the lorry which was travelling on the left side of the road. The lorry was pushed back and completely knocked off the road. It fell with all its contents and passengers into a ditch in the bush about 20 ft. deep on the left side of the road. The car No. URW 107 was then driven by the second defendant.

The plaintiff says that in consequence of the collision and the lorry falling into the ditch he became unconscious and only regained consciousness after he had been pulled out of the lorry. He then became aware that he had suffered injuries. His left leg was broken and he had a wound on the upper part of his left knee.

Later he was removed and taken to Masaka hospital where he remained on admission for a period of three months as an in-patient undergoing treatment. On his discharge he continued to attend the hospital as an out-patient fortnightly for another period of eight months.

On March 11, 1963 it is the plaintiff's case that he submitted himself for examination by Dr. Manbhai Patel (P.W.1), who, on examining him, found that he had a fractured femur, lower third, in which there was inserted a nail which is the normal and usual treatment for that type of fracture. Dr. Manbhai Patel also found that the plaintiff had a limitation of knee flexion up to 90°, the lower extremity being shortened by about 3/4 in., as a result of which the plaintiff had to walk with a limp. In his opinion the

plaintiff was 30 per cent. permanently disabled. He was unable to flex his knee and perform a number of routine duties such as sitting down on a lavatory seat or sitting down on the floor with

his legs crossed. The plaintiff was still suffering from pain, which pain, in Dr. Manbhai Patel's opinion, was likely to cease after about one year. To remove the nail inserted in the fracture another operation would be required. The plaintiff says that by reason of the injury and pain suffered by him he has now brought this action claiming general damages, and, by way of special damages, his salary and allowances for 19 months and 15 days at the rate of Shs. 450/- per mensem amounting to Shs. 8,775/-, medical expenses amounting to Shs. 2,307/60 and interest.

In their defences the first and second defendants, as already stated above, have denied negligence and liability for the collision. In particular, the first defendant says that it was the second defendant who was negligent and that the second defendant was driving his car and descending the little hill at a speed of between 50 and 60 m.p.h., when suddenly he lost control of the car and the car then swerved from the centre of the road and hit the lorry on the left side of the road, thereby knocking the lorry completely off the road into a ditch 25 ft. deep, resulting in the plaintiff and his driver, Manueri Egesa (D.W.2) being injured.

It is the first defendant's case that the plaintiff was employed by him at a salary of Shs. 300/- per mensem, and that it was part of the plaintiff's duty to control, direct and supervise the work of the driver of the lorry whenever he was on tour with the lorry and to take full charge of the lorry and management of the transport business as he himself was at the time in the employ of Messrs. Bikali Coffee Co. as a cashier.

The first defendant says that after the accident he had paid all the medical expenses incurred by the plaintiff while undergoing treatment in hospital. He also paid to the plaintiff the sum of Shs. 900/- which was fixed by the Labour Office as compensation for the accident, and, for that payment, he was issued with an official receipt, Exhibit D1A, by the Labour Office. After the accident the plaintiff failed to return to work even though his appointment was not and up to now has not been determined by him.

On the other hand the case of the second defendant is that it was the first defendant's driver who was negligent in that the first defendant's lorry, No. URG 370 was driven into his Wolseley car No. URW 107, which was then stationary by the left side of the road. He says that while descending a little hill he had driven suddenly into a heavy cloud of smoke, which was caused by wild bush fires along the road side. He had slowed down his car and was driving slowly when suddenly the smoke became so thick and intense that visibility became impossible. He therefore pulled up his car and stopped to his left side of the road, while remaining in the car. Then all of a sudden the first defendant's lorry, which he did not and could not see because of the density of the smoke, but which was apparently approaching his car from the opposite direction at a very high speed collided with his stationary car, hitting it on the right side and pushing it across the road at an angle. The lorry then fell into a ditch by the side of the road. There were then in his car with him three school girls and a motor boy. The second defendant has denied that he had swerved across the road to hit the first defendant's lorry. He has also denied that his car was in motion before the collision, and that it was travelling at a speed of about 60 m.p.h.

At the close of the case for the plaintiff, counsel for the first defendant had applied that the first defendant be dismissed from the suit as on the evidence and on the admission by the plaintiff it was the second defendant who was negligent. I had declined to grant that application because I was of the opinion that where, as in this case, the plaintiff has alleged negligence on both defendants and appears not to be positively certain which of whom was in law negligent, it is more appropriate and in the interests of justice that the court should only come to a definite

finding after hearing the whole case. I then had in mind the decision of the Divisional Court in *Hummerstone v. Leary* (1), the circumstances in which were not dissimilar to those in the instant case.

There the plaintiffs, who were injured in a collision between a motor lorry, in which they were passengers, and a motor-car, had brought an action in the county court claiming damages, making the owners of both vehicles defendants. The plaintiffs' evidence appeared to make it probable that the driver of the car rather than the driver of the lorry was to blame. The plaintiffs could do no more than state what they had observed just before the accident. At the close of the plaintiffs' case, on the application of the counsel for the owner of the lorry that there was no evidence against him the county court judge dismissed the defendant from the suit. The case then proceeded against the other defendant, whose witnesses threw all the blame on the driver of the lorry. The county court judge then found that the driver of the car was not negligent and thereupon entered judgment for the second defendant.

On appeal, it was held by the Divisional Court that as a state of facts was proved by the plaintiffs from which the reasonable inference to be drawn was that, *prima facie*, one, if not both, of the defendants was negligent, the county court judge should not have dismissed the first defendant, the owner of the lorry, from the action at the close of the plaintiffs' case but should have heard the case against both defendants before coming to a decision. A new trial was therefore ordered.

In his final address at the close of the trial of this case, counsel for the first defendant informed the court that the first defendant had abandoned his defence under ss. 16(1) and 25(1)(c) of the Workmen's Compensation Ordinance as pleaded by him in para. 2 of his written statement of defence. He submitted that as there was no evidence before the court of any agreement for compensation between the plaintiff and the first defendant in terms of, and in compliance with the provisions of s. 16(1) of the Ordinance, he was unable to press home his defence under s. 25(1)(c) of the Ordinance. The submission was noted by the court, and as it is, no arguments were addressed to the court by counsel for the first defendant on the issue of compensation.

On the evidence it seems clear that the collision complained of had occurred as the result of negligence by someone. Of that there can be no doubt. The two defendants gave me the impression that they were more concerned with blaming each other for the accident than with defending themselves. I am of the opinion that the evidence of the plaintiff even taken by itself has clearly disclosed a case of negligence. The main issue for determination by the court would appear to have resolved itself to the question, whether the first and second defendants were equally or proportionally negligent; and if not, who, as between the two defendants, was negligent?

Before attempting to deal with that question, it may be convenient at this juncture to consider a point of law which was raised and argued by counsel for the second defendant. In his address to the court counsel for the second defendant had drawn the court's attention to the second defendant's defence contained in para. 2 of his amended statement of defence. He submitted that under the provisions of s. 24(1) of the Workmen's Compensation Ordinance, the plaintiff is not entitled to recover damages for the injuries which he had suffered, having regard to his acceptance of compensation from the first defendant. He contended that it was immaterial whether or not the first defendant had abandoned his defence under ss. 16(1) and 25(1)(c) of the Workmen's Compensation Ordinance as by reason of the provisions of s. 24(1) the plaintiff was debarred from recovering both compensation and damages for the same injury. Counsel for the plaintiff in reply submitted that the action before the court was only for damages and not for both compensation and damages.

I do not think that the submission of counsel for the second defendant could be sustained in the circumstances of this case. The provisions of s. 24(1) of the Workmen's Compensation Ordinance are as follows:

- “24. Where the injury in respect of which compensation is payable under the provisions of this Ordinance was caused under circumstances creating a legal liability in some person other than the employer to pay damages in respect thereof:
- (1) the workman may take proceedings both against that person to recover damages and against any person liable to pay compensation under the provisions of this Ordinance for such compensation, but shall not be entitled to recover both damages and compensation.”

In terms of the above provisions, it seems to me that it is only a case in which compensation is payable under the provisions of the Workmen's Compensation Ordinance, that is to say, such a case as is provided for under s. 16(1) of the Ordinance and in which the provisions of s. 25(1)(c) can be pleaded as a bar to a subsequent action for damages which can properly be regarded as falling within the provisions of s. 24(1) of the Ordinance.

The only evidence of compensation in this case was given by the first defendant, who later abandoned the defence, quite rightly I think, because the payment did not fall within the provisions of s. 16(1) of the Ordinance. There was no agreement in writing. The compensation, I find as a fact, was not agreed between the first defendant and the plaintiff. There is no evidence that the Labour Officer who received the sum of Shs. 900/- from the first defendant and who later paid over the said sum to the plaintiff was appointed by the Labour Commissioner in writing in that behalf. There is no evidence that the sum of Shs. 900/-, which, I find as a fact, was paid to the plaintiff, was the result of agreement or even of negotiations between the plaintiff and the first defendant.

Now the facts relating to the issue of compensation I find to be that after the plaintiff had been discharged from hospital and whilst still undergoing treatment, the first defendant had paid to the Labour Office the sum of Shs. 900/- as compensation for the injuries suffered by the plaintiff. There is no evidence as to how that compensation came to be fixed. After the payment the Labour Office had issued the first defendant a receipt, Exhibit D1A. The amount was subsequently paid by a Labour Officer to the plaintiff. I accept the plaintiff's evidence and find as a fact that the plaintiff had regarded the amount paid to him as an advance made to him by way of a loan which he would refund on receiving payment for his injury from an insurance company. It is highly improbable that the Labour Officer did explain to the plaintiff that the money was compensation to which he was entitled under the Workmen's Compensation Ordinance. The probability is that the plaintiff was told by the first defendant that he would want the money refunded to him if the plaintiff should get payment from the insurance company with which the vehicle was insured.

In my view the plaintiff has not been paid compensation in the strict terms of the provisions of s. 16(1) of the Workmen's Compensation Ordinance as the said provisions were not complied with by the first defendant. The claim before this court is only for damages and not for both damages and compensation. It follows I think that the submission of counsel for the second defendant is not well founded. It is unsound and must be rejected and I do so reject it.

It may be of interest to note that the circumstances disclosed in the instant case are somewhat in line with those which were found in *Lind v. Johnson* (2), although the decision of the court was based on the construction of s. 30 of the English Act of 1925. In that case the plaintiff, a farm labourer, was injured in a collision between his employer's van, which he was driving, and a motor lorry by the

defendant. The defendant admitted the negligence of his driver but relied on the Workmen's Compensation Act, 1925, s. 30 alleging that the plaintiff had received compensation under the Act and was debarred from receiving damages.

The plaintiff was in fact paid full wages all the time he was off work and made no claims for compensation. Sometime after his return to work he signed the usual form that he had received compensation at the rate of Shs. 30/- per week. The employer in fact never received from insurance any sum in respect of the compensation and the plaintiff received only his full wages as stated above. It was held that the plaintiff had received wages only and not compensation and no question arose under s. 30 and that the plaintiff was entitled to recover in the action.

I turn now to consider the evidence in this case as a whole. As already indicated I am satisfied that the accident in which the plaintiff was injured was the result of negligence. The question is whose negligence?

The story of the second defendant as to the circumstances and the manner in which the collision had taken place, albeit plausible, has not the ring of truth, nor does it carry conviction with it. I consider it highly improbable.

In describing how the accident occurred the second defendant says:

"On the way from Masaka as I was descending a hill I ran into a heavy cloud of smoke suddenly, and I had to slow down, but when I found that I could not drive on because the smoke was too thick I pulled up my car and stopped on the left side facing Mbarara. This was a few feet from the murram bit of the road. Then all of a sudden a lorry came at a very high speed, hit my car and fell into a ditch by the side of the road . . . I did not see the lorry approaching because of the thickness of the smoke . . . I was in the thick fog. While in the car and remaining stationary I could not see at all because of the smoke. Visibility was nil."

On the evidence of the second defendant as set out above there is clearly an admission of negligence, presumably on the assumption that by reason of the speed of the lorry the defence of contributory negligence was available. For, if it is true, which is doubtful, that the road was enveloped in thick smoke the density of which had made visibility impossible, then the second defendant, by merely stopping his car on the side of the road and remaining in the said car without sounding his horn or switching on his lights or taking such other precautionary steps sufficient to warn other users of the road of the presence of his car, had failed in his duty of care to such other users of the road. It is strange that not one of the passengers in the car was called as a witness.

However that may be, the evidence, which I accept, and which establishes to my satisfaction the manner in which the accident complained of had occurred is that the lorry No. URG 370 was travelling on the left side of the road ascending a small hill that day at the speed of between 25 and 30 m.p.h.; that the road was straight and clear; that the car No. URG 107 was at the time of the collision in motion, that it was travelling at the speed of between 50 and 60 m.p.h. and descending the same small hill on its way from Masaka; that in descending the hill the second defendant, who was the driver of the car, had lost control of the car, that the car then suddenly swerved from the right side across the left side of the road and there collided with the lorry, causing it to fall into a ditch 25 feet deep on the left side of the road.

On these several points the evidence of the plaintiff has been amply corroborated by the evidence of Manueri Egesa (D.W.2), who was the driver of the lorry and was called as a witness for the first defendant.

In the result on the facts I have reached the conclusion that it was only the second defendant who was

to blame for the accident. I am satisfied that he

alone was negligent. There can therefore be no question of contributory negligence or of contribution by the first defendant.

I must now turn to the question of damages, which on the state of the evidence of the plaintiff is not by any means an easy question. There is, for instance, no medical evidence as to the injury which was suffered by the plaintiff immediately after the accident and the nature of treatment given to the plaintiff on admission into hospital. The testimony by the plaintiff is that on becoming conscious he became aware that he had suffered injuries. His left leg was broken and there was a wound on the upper part of the knee. He was in hospital for three months as an in-patient and as an out-patient for a further eight months, attending hospital fortnightly.

All the medical expenses incurred by the plaintiff I find had been paid by the first defendant. The evidence as to the loan does not apply to hospital expenses. This plaintiff is therefore in my view entitled to claim only his wages by way of special damages. According to the particulars of special damages set out in the plaint filed the plaintiff claims his salary from May 26, 1962 to January 10, 1964, i.e. for 19 months and 15 days, at the rate of Shs. 450/- per mensem. It is not clear from the evidence why the claim should date from May 26, 1962. Is it being suggested that for the month of May the plaintiff did not receive his full pay?

On the evidence of Dr. Manbhai Patel, which I accept on this point, the plaintiff was in a position to resume his work three months after his examination of him. Which means that by June 1, 1963 the plaintiff was fit to resume his work. Mr. Croot says that the plaintiff was in July, 1963, when he examined him, fit to work and would have been fit to resume his former job about August, 1963. In the circumstances I will award the plaintiff his salary for 12 months, that is, from June 1, 1962 to June 1, 1963, which I find as a fact on the evidence of the first defendant, which I accept, to have been Shs. 300/- per mensem. The plaintiff is therefore entitled to Shs. 3,600/- as special damages. I reject his claim to allowances, which I am satisfied has not been proved.

I hold that the plaintiff is 15 per cent. disabled on the evidence of Mr. Croot which I prefer to that of Dr. Manbhai Patel on this point. He is at present employed. He is paid on commission. Applying the principle enunciated in the recent English case of *Warren v. King* (3), that in every personal injury case, it is the duty of the court to see that in fixing damages such damages should not be too favourable to the plaintiff but should be "a moderate sum reasonable as between the parties", and bearing in mind the position and the earning capacity of the plaintiff and his standard of life, I am of the opinion that in the interests of justice the plaintiff is entitled to general damages, which I assess and fix at Shs. 16,400/- and now award him.

In sum, there will be judgment which I now do enter for the plaintiff as against the second defendant alone for negligence in the sum of Shs. 3,600/- special damages and of Shs. 16,400/- general damages, totalling Shs. 20,000/- with costs. I also award the plaintiff 6 per cent. Interest on this sum until payment.

The claim against the first defendant is dismissed with costs against the plaintiff.

Judgment for the plaintiff against the second defendant for Shs. 20,000/-.

For the plaintiff:

D. A. Patel, Kampala

For the first defendant:

Manubhai Patel & Son, Kampala
M. L. Patel

For the second defendant:
Hunter & Greig, Kampala
A. I. James

**Aktiebolaget Jonkoping-Vulcan Indstricksfa-Briksaktiebolag v East Africa
Match Co Ltd**
[1964] 1 EA 62 (HCU)

Division:	High Court of Uganda at Kampala
Date of judgment:	17 February 1964
Case Number:	669/1962
Before:	Udo Udoma
Sourced by:	LawAfrica

[1] Trade mark – Infringement – Labels on boxes bearing device of sailing ship – Competitor marketing similar goods bearing device of steamship – Countries where competing goods manufactured stated on labels – Countries different – Deception of public.

[2] Passing off – Matches – Labels on boxes bearing device of sailing ship – Competitor marketing similar goods bearing device of steamship – Countries where goods manufactured stated on labels – Countries different – Deception of public – Prospect of confusion.

Editor’s Summary

In 1928 the plaintiff company registered in Uganda a trade mark for safety matches bearing the design of a sailing ship. Thereafter the plaintiff company’s matches bearing their trade mark and the trade name “The Ship” marked on the labels of the boxes were distributed and sold in Uganda through its agents there. In 1950, without objection from the plaintiff company, the second defendant company registered in Kenya a trade mark for safety matches bearing the design of a steamship, and in 1961 the first defendant company under licence from the second defendant company started manufacturing and marketing matches in East Africa under that trade mark and with the trade name “The Steamship” on the labels. The plaintiff company then sued the defendants claiming an injunction restraining them from infringing their trade mark and damages for passing off their matches as those of the plaintiff company. It was common ground that the plaintiff company’s matches were manufactured in and imported from Sweden and that the matches of the first defendant company were manufactured in Kenya and that the words “Made in Sweden” and “Made in East Africa” were prominently printed on their respective labels. For the plaintiff company it was submitted that the words “The Ship” had acquired an exclusive and secondary meaning denoting only the matches of the plaintiff company, that “The Steamship” matches had been introduced by the defendants to cause confusion with and in fraud of the plaintiff company’s products, and that

confusion had in fact been caused and was likely to continue. The defendants denied infringement of the plaintiff company's trade mark or that their trade mark was calculated to deceive or cause confusion or defraud and contended that their labels were distinctly and differently marked from the plaintiff company's labels and that no confusion had been caused. At the trial one of the plaintiff company's witnesses conceded that the labels on the goods of the plaintiff company and the defendants were dissimilar and that the only common feature of them was the design of a ship on water. Another witness for the plaintiff company stated that at each shop he visited to ask for "The Ship" matches he was invariably sold "Steamship" matches. Among the witnesses for the defendants were eight small shopkeepers engaged in retail trade who testified that none of their customers had been deceived or confused.

Held –

- (i) it had not been proved that the term "The Ship" had acquired a secondary or special meaning so as to denote or to be descriptive only of the goods of the plaintiff company in Uganda;
- (ii) the two labels were completely different both as to their get-up and lay-out

generally and no ordinary person looking at a box of matches bearing the defendants' label could be led to believe that it was similar to that of the plaintiff company whether placed side by side or not; accordingly there had been no infringement of the plaintiff's trade mark;

- (iii) the use by the defendants of their trade mark in connection with their safety matches did not imply any misrepresentation that the matches sold by the defendants were the goods of the plaintiff, or that it was calculated to deceive any one.

Action dismissed.

[**Editorial Note:** see also [1958] E.A. 463.]

Cases referred to in judgment:

- (1) *Fox's Glacier Mints Ltd. v. Jobbings* (1932), 49 R.P.C. 352.
- (2) *Payton & Co. Ltd. v. Snelling Lampard & Co., Ltd.*, [1901] A.C. 308.
- (3) *Parker Knoll Ltd. v. Knoll International Ltd.*, [1962] 10 R.P.C. 265.
- (4) *British Vacuum Cleaner Co. Ltd. v. New Vacuum Cleaner Co. Ltd.*, [1907] 2 Ch. 312.
- (5) *Seixo v. Provezende* (1866), 1 Ch. App. 192.

Judgment

Udo Udoma CJ: In this case the plaintiff, a limited liability company incorporated in Sweden, claims against the two defendants, both of which are likewise limited liability companies, incorporated in Kenya, East Africa, the following: (1) an injunction to restrain the defendants from infringing the plaintiff company's trade mark No. 533 Ship Brand safety matches registered in Uganda in Class 47 (Schedule II) of the Register of Trade Marks; (2) delivery up for destruction of all safety match labels and wrappers in the possession or under the control of each of the defendants bearing the representation of a ship, not being labels or wrappers emanating from the plaintiff company; (3) damages or an account of profits; (4) Costs, etc.

At the hearing Counsel for the defendants by leave amended para. 9 of the statement of defence by deleting the words "Bhagwanji & Company Limited" wherever they appear in the said paragraph and substituting therefore the words "Premchand Brothers Limited."

From the pleadings filed and the submissions of counsel, it appears that the claims of the plaintiff comprise two main heads. The first head concerns an infringement of the trade mark No. 533 "The Ship" in respect of safety matches manufactured by the plaintiff company, while the second head relates to a claim based on the passing off of the said trade mark by the defendants.

The plaintiff company is the registered proprietor of the trade mark No. 533 "The Ship" safety matches exhibited in these proceedings and marked "Exhibit A". On September 20, 1928, as manufacturer and dealer in matches, the plaintiff company had registered with the Registrar of Trade Marks in Uganda under the Trade Marks Ordinance in Class 47 (Schedule II) the trade mark No. 533 "The Ship" safety matches. On January 18, 1960, the registration was renewed for another period of 14 years. It is still on the Register.

Since the first registration, the brand of matches bearing the trade mark No. 533 “The Ship” safety match has been distributed and sold in Uganda by the plaintiff company through its representatives or agents. In 1939 the B.E.A. Corporation Ltd. became and still now is the agent and representative in East Africa of the plaintiff company for the purpose of distributing and selling the said matches as wholesale dealers.

Up to 1961 the B.E.A. Corporation Ltd., as agents and representatives of the plaintiff company, were distributing in East Africa matches bearing the trade mark, the subject-matter of this action in three sizes, namely, small, medium and large. But as from the end of 1961 the plaintiff company changed its products and concentrated in sending to East Africa the small and large sizes of matches known as No. 3A and No. 1D respectively, both of which sizes are exhibited in these proceedings and marked respectively Exhibits C and D.

As wholesale dealers the B.E.A. Corporation Ltd. does not deal directly with the public as its merchandise is sold directly to wholesale dealers, who, in turn, retail the same to members of the public. Which means in effect that the B.E.A. Corporation Ltd. has no direct dealing with the individual consumers of matches.

In addition to the matches bearing the trade mark in dispute, the B.E.A. Corporation Ltd. also deals in the "Pamba Ya Uganda" brand of matches, which is manufactured also by the plaintiff company. It is the plaintiff's case that the result of handling these different brands of matches is that each brand has its own pocket of popularity in Uganda, "The Ship" brand being popular throughout Uganda, while the "Pamba Ya Uganda" brand is only popular in Buganda.

The plaintiff company now complains that in 1962 for the first time another brand of matches known as "The Steamship Safety Matches" exhibited in these proceedings and marked "Exhibit E", which are manufactured by the first defendant company and distributed by the second defendant company, appeared on the market in Uganda.

It is the case of the plaintiff company: (1) that a stick of Exhibit E (The Steamship Safety Matches) is of the same size as that of the plaintiff company's size 3A, Exhibit C, although the actual box of the Steamship Safety Matches is larger than the plaintiff company's size 3A; (2) that the Steamship Safety Matches, Exhibit E, is now widely distributed among the small retailers in Uganda; (3) that prior to the appearance of the Steamship Safety Matches on the market in Uganda, the defendants were only manufacturing and distributing two other brands of matches known as "The Twiga" and "The Tembo", both of which are no longer in circulation in Uganda; (4) that the plaintiff company's brand of matches, The Ship Safety Match, has since acquired an exclusive and secondary meaning in that it has become known as "The Ship Match" throughout Uganda, the Ship Match being distinctive of its products and the said Ship Match having now come to be identified with the plaintiff company's name; (5) that the Steamship Safety Matches have been introduced by the defendants for the purpose of causing confusion with, and in fraud of the Ship Safety Match produced by the plaintiff company, the Steamship Safety Matches having been produced as a colourable imitation of the plaintiff's goods known as "The Ship Safety Match" for the purpose of the same being passed off as the goods of the plaintiff company; and (6) that confusion has in fact been caused and is likely to continue to be caused between the plaintiff company's brand of matches, the Ship Safety Match, and that of the defendants, the Steamship Safety Matches. For these reasons the plaintiff company has now brought this action seeking the relief set out above.

The defendants by their defence say that the Steamship Safety Matches are manufactured locally at Mombasa in Kenya, East Africa, by the first defendant company, the second defendant company having nothing whatsoever to do with the manufacture of the said matches, and that neither the first defendant company nor the second defendant company has at any time anything to do with the designing of the labels and wrappers of the Steamship Safety Matches aforesaid and the registration of the trade mark Steamship Safety Matches in Kenya.

It is common ground that the trade mark Steamship Safety Matches with the design, Exhibit O, in these proceedings was registered by Messrs. Premchand Bros. Ltd. in 1950 with the Registrar of Trade Marks, Kenya, under the Trade Mark Ordinance of that country as trade mark No. 4719 in Class 47 (Schedule II). Prior to the said registration, the said trade mark was advertised in the Kenya Gazette of November 28, 1950 under Notice No. 2804 in accordance with the laws of Kenya. The plaintiff company did not protest against such registration.

It was Messrs. Premchand Bros. Ltd., which as registered proprietors of the trade mark No. 4719 in Class 47 (Schedule II) in the Register of Trade Marks in Kenya, had in 1961 granted to the first defendant company a licence to manufacture matches bearing the said trade mark, "Steamship Safety Matches", in East Africa. The licence then granted to the first defendant is exhibited in these proceedings and marked "Exhibit P".

The defendants admit that prior to the appearance of the Steamship Safety Matches, Exhibit O, in Uganda the Twiga and Tembo brands of matches were also manufactured by the first defendant company and distributed in Uganda by the second defendant company, and that the distribution of the Twiga was subsequently stopped because it was discovered to be of a very poor quality and evoked a lot of complaints from consumers. The Steamship Safety Matches are of a much higher quality than the Twiga.

The defendants have denied: (1) the alleged infringement of the plaintiff company's trade mark "The Ship Safety Match"; (2) that the use of the trade mark "The Steamship Safety Matches" is calculated to deceive, or cause confusion, or to defraud the plaintiff company; (3) that any confusion has in fact been caused thereby. They say that the labels of their Steamship Safety Matches are distinctly and differently marked from the plaintiff company's "The Ship Safety Match", and that theirs being local products have a popular appeal to the local population. They are also infinitely cheaper than the plaintiff company's brand, which is imported, the former bearing the distinctive mark on the label "made in East Africa" in contrast to the marking on the Ship brand, which is "made in Sweden". They say further that their "Steamship Safety Matches" bear a yellow label with black and red printing thereon, such label bearing a representation of a steamship printed in black with a black and red funnel with the word "Steamship" printed in black in prominent letters above the steamship, and that the word "Steamship" is a trade name adopted by the first defendant company to distinguish its products, the representation of a steamship being a trade mark which the first defendant company has acquired the right to use.

It would appear from the evidence that two main issues fall for determination by the court in this case, namely: (1) whether by adopting their trade mark No. 4719, Exhibit O, and manufacturing and distributing safety matches bearing labels with the said trade mark the defendants have infringed the plaintiff company's trade mark, No. 533, for safety matches in the Register of Trade Marks in Uganda; and (2) whether the defendants have thereby been guilty of passing off their goods as those of the plaintiff company.

The present case is concerned with the selling of goods under a mark with a name. The plaintiff company says that its trade mark has been deliberately infringed, and it fears that if the defendants are not restrained by the court by means of an injunction but are allowed to continue to manufacture and distribute and sell their brand of matches as they are doing at present many people would buy the defendants' matches in the belief that they are buying matches of the plaintiff company's manufacture. The reason for this fear, the plaintiff company says, is that the defendants' brand of matches closely resembles that of the plaintiff company, that resemblance being brought about by both the

use of the word “Steamship” and the design of a steamship represented in the defendants’ label on a box of matches.

In support of the case of the plaintiff company that the defendants’ design of a steamship and the use of the word “Steamship” as a trade mark has already caused confusion in the minds of the public, apart from the first witness for the plaintiff, who is a representative or agent of the plaintiff, three witnesses were called for the plaintiff company, the bulk of whose testimony was to show (1) that the name “Ship” has always been and is associated only with matches manufactured by the plaintiff company; (2) that in that respect plaintiff’s matches “The Ship” has acquired a secondary meaning and that by reputation in the market “The Ship” has come to denote the goods, that is, matches, manufactured by the plaintiff company; and (3) that members of the public are now confusing the defendants’ brand of matches with that of the plaintiff company. Of the three witnesses, two of them, Alozio Mugonsonga Kawagga (P.W.2) and Job Wacha (P.W.4) are employees of the firm of advocates acting for the plaintiff company in this case, while one Yoakim Paulo Kiiza (P.W.3) is an employee of the agents of the plaintiff company.

Job Wacha (P.W.4) admitted in cross-examination that he was sent out specifically to obtain evidence for this case. Yoakim Paulo Kiiza (P.W.3), apart from admitting that he knew the brand of matches he was looking for while shopping, also stated that at the shop he had asked, speaking in Swahili, for “one gross of steamship matches” and in return he was supplied with Exhibit L, which of course are “Steamship Matches”.

It is the duty of this court in the circumstances of this case and in the interests of justice to scrutinise very carefully any evidence obtained in this way by witnesses specially commissioned for the purpose. Evidence obtained in this manner cannot be said to be altogether free from suspicion.

I turn then to consider the evidence of Alozio Mugonsonga Kawagga (P.W.2), the substance of which is to the effect that on the instructions of his employers he had visited certain shops in Kampala for the purpose of buying the “Ship Matches”. At each shop visited by him he had asked for the “Ship Matches” and that instead of being sold the “Ship Matches” he was invariably sold the “Steamship Matches” to his surprise and amazement. At some of the shops he had spoken to the shopkeepers in English and at others in Swahili, the local language commonly in use throughout East Africa. He had known before that day of the existence of only what he has called in this court “the sailing ship brand of matches”, which of course is the “Ship Safety Match”. He had never before known of the “Steamship Safety Matches” and never heard of any matches made in East Africa. He says further that he normally never bought matches himself.

It is not however clear why the defendants were not informed promptly or at all of what had taken place in the course of the shopping expedition undertaken by Alozio Mugonsonga Kawagga (P.W.2). Had the defendants been informed I think it would have afforded them the opportunity of investigating these incidents. In my view the omission is a serious one. See *Fox’s Glacier Mints Ltd. v. Jobbings* (1), mentioned in *Kerley on Trade Marks* (8th Edn.) at p. 278, footnote 22. By omitting to draw the attention of the defendants to the incidents spoken of by Alozio Mugonsonga Kawagga (P.W.2) in this court the defendants have been deprived of the opportunity of dealing with the evidence prior to the hearing of this case. The evidence of Alozio Mugonsonga Kawagga (P.W.2) was however vigorously attacked by the counsel for the defendants.

With the evidence of Alozio Mugonsonga Kawagga (P.W.2) I contrast the evidence of the witnesses called for the defendants. Discounting the evidence of Velji Raymal Shah (D.W.1), who, as an agent for

the defendants, cannot be

said to be altogether disinterested, the court is left with a mass of evidence given by nine witnesses to the effect in substance that no confusion has ever occurred among their customers between “The Ship Safety Match” and “The Steamship Safety Matches”.

Eight of these witnesses are small shopkeepers engaged in the retail trade. They deal in matches of different makes and with a variety of label designs. I am aware that as middlemen in matches, among other things, these witnesses cannot easily be deceived as they might be familiar with several brands of matches. But I think it is not without significance that in their experience as small dealers none of their customers has been deceived or confused. I am satisfied that they were honest and fair in their evidence and accept it.

As a general proposition of law, I think I am right in stating that the burden of satisfying the court that there has been an infringement of its trade mark is on the plaintiff company. It is for the plaintiff company to prove that there is a resemblance between the two marks, and that such resemblance is deceptive. It is also a well-established principle of law that it is the duty of the judge to decide whether the trade mark complained of does so nearly resemble the registered trade mark as to be likely to deceive or cause confusion in the minds of the public. From that duty the judge cannot abdicate. That was the principle enunciated by Lord MacNaghten in the House of Lords in *Payton & Co. Ltd. v. Snelling Lampard & Co. Ltd.* (2) when he said ([1901] A.C., at p. 311):

“I think as I have said before that a great deal of the evidence is absolutely irrelevant and I do not myself altogether approve of the way in which the questions were put to the witnesses. They were put in the form of leading questions; and the witnesses were asked whether a person going into a shop as a customer would be likely to be deceived and they said they thought he would. But that is not a matter for the witnesses; it is for the judge. The judge, looking at the exhibits before him and also paying attention to the evidence adduced, must not surrender his own independent judgment to any witness.”

The same principle was reaffirmed by Lord Denning in *Parker Knoll Ltd., v. Knoll International Ltd.* (3), when he observed as follows (10 R.P.C., at p. 274):

“No witness is entitled to say that the offending mark so nearly resembles the registered mark as to be likely to deceive and cause confusion for that is the very question that the judge has to decide. It is a question on which the judge has to bring his own mind to bear and which he has to decide himself”.

See also *British Vacuum Cleaner Co. Ltd. v. New Vacuum Cleaner Co. Ltd.* (4) ([1907] 2 Ch., at p. 328).

On the principles stated above, I must examine the two marks so as to determine, giving due weight to the evidence before me, whether there are resemblances and whether such resemblances are such as to be likely to deceive or cause confusion. But before doing so, I ought to, I think, dispose of one point which was sought to be made by counsel for the plaintiff in regard to the use of the words “The Ship” on the plaintiff’s trade mark, Exhibit A.

At first it was sought to show that the plaintiff company by its user had acquired exclusive right to the use of the word “Ship” on the label of its matches by reason of registration. This was however later modified by counsel for the plaintiff in his address when he said:

“We do not claim the exclusive use of the words “The Ship” in red, but only in so far as the words form part of the trade mark as a whole.”

That being so, it is sufficient only to observe that if this issue had not been modified

it would have been very difficult to grant to the plaintiff company the exclusive right to the use of the words “The Ship” which are in ordinary use in the English language. Moreover, the words “The Ship” do not appear to have been specifically registered as such by the plaintiff company as a trade mark. The words, “the Ship” only become trade marks when they form part of the label, and therefore merely constitute a part of the trade mark registered as No. 533 in the Register of Trade Marks in Uganda.

I find that neither the words “The Ship”, nor the words “The Ship Brand” as such have been registered by the plaintiff company as a trade mark. I find also that the term “The Ship” has not been proved to have acquired a secondary or special meaning so as to denote or to be descriptive only of the goods of the plaintiff company in Uganda.

It is now necessary to examine the two trade marks in some detail. In para. 5 of the plaintiff company’s plaint it is averred:

“For upwards of 34 years safety matches manufactured or sold by the plaintiff and its predecessors have been sold in Uganda in boxes, and packets bearing a distinctive label in substantially the form of the said trade mark, the said label being printed in black upon a yellow ground. The said label has always comprised as a prominent feature of the distinctive get up and general layout thereof a representation of a ship floating on water and the word “Ship”.”

But in paragraph 3 of the defendants’ defence the defendants’ trade mark is described in the following terms:

“Since the month of January, 1961 they have put upon the market and sold safety matches manufactured by the first defendant, East Africa Match Co. Ltd., in boxes bearing a yellow label with black and red printing thereon, such label bearing a representation of a steamship printed in black with a black and red funnel with the word Steamship printed in black in prominent letters above the said steamship. The word steamship is a trade name which the said first defendant has adopted to distinguish its products in business and the representation of the said steamship as aforesaid is a trade mark which the said first defendant has acquired the right to use.”

In the course of his evidence when asked under cross-examination to describe differences between the plaintiff’s trade mark and that of the defendants, this was what Klaus Andrew Eckhart (P.W.1), the principal witness for the plaintiff company, said:

“I now see Exhibits D and F (Exhibit D being the Sailingship match and Exhibit F the Steamship match in boxes). I agree that Exhibit F has a very large label covering one side of the box while Exhibit D has only a small size label. The Steamship label on Exhibit F is vertical, whereas the label on Exhibit D is horizontal. I agree that Exhibits D and F when placed side by side are dissimilar. They are of different sizes. The label on Exhibit F is distinctly marked on each side “made in East Africa” whereas on Exhibit D the marking is “made in Sweden”. In regard to exhibit D the words “the Ship” are on top of the sailingship in red, whereas in Exhibit F the word “Steamship” is written in black on a yellow background in the picture panel. I agree that the colour of yellow forming the background and of red are not ours exclusively. We have not the exclusive use of them. Exhibits D and F are dissimilar. The only things common to them are the two ships on water. The one is a sailingship and the other a steamship. In a shop these dissimilarities are more pronounced than they are now in court between

Exhibits D and F. The steamship match is cheaper than the sailingship or “the Ship” match.”

I have carefully examined and compared the two trade marks Exhibits A and O and I am satisfied that the dissimilarities testified to by Klaus Andrew Eckhart (P.W.1) in the evidence set out above are accurate. I am therefore unable to accept the contention of counsel for the plaintiff company that the trade marks Exhibits A and O are so similar as to cause or likely to cause confusion. I find as a fact that the two trade marks are completely different both as to their get-up and lay-out generally. I am of the opinion that the two marks are so dissimilar that no ordinary person looking at the defendants’ trade mark, Exhibit O, can be led to believe that it is similar to that of the plaintiff company, Exhibit A, whether placed side by side or not; or that Exhibit O is capable of being accepted by anyone as that of the plaintiff company.

I think it is plain that anyone who had seen the one trade mark at any time cannot on meeting the other think that he was seeing a second time what he had seen before. In my view there is no resemblance between Exhibit A and O, apart from the two ships floating on water. In regard to the floating ships counsel for the plaintiff company, in the course of his address, had clearly indicated to the court that the plaintiff company does not claim exclusive user of the design of a vessel floating on water provided that such a vessel does not resemble the ship in Exhibit A. I am satisfied on the evidence that the steamship on Exhibit O does not resemble the sailingship on Exhibit A.

In cases of this kind the principle upon which relief is given by the court is that a man cannot offer his goods for sale representing them to be the goods or manufacture of a rival trader; and such representation might take the form of the use of the same or similar trade mark or brand, which is the substance of the complaint in this case. To constitute such a representation it is not necessary that the trade mark or brand complained of should be absolutely identical with or resemble too closely the mark or brand sought to be represented in every material particular.

As was said by Lord Cranworth, L.C. in *Seixo v. Provezende* (5) (1 Ch. App., at p. 196):

“What degree of resemblance is necessary from the nature of things, is a matter incapable of definition a priori. All that courts of justice can do is to say that no trader can adopt a trade mark so resembling that of a rival, as that ordinary purchasers purchasing with ordinary caution, are likely to be misled.

It would be a mistake, however, to suppose that the resemblance must be such as would deceive persons who should see the two marks placed side by side.

If a purchaser looking at the article offered to him would naturally be led, from the mark impressed on it, to suppose it to be the production of the rival manufacturer, and could purchase it in that belief, the court considers the use of such a mark to be fraudulent.”

In the circumstances of this case, I am of the opinion that there is no likelihood of any purchaser looking at any box of matches bearing the mark, Exhibit O, being led to believe that such a box of matches was the production of the plaintiff company and would purchase it in that belief.

I now come to the claim of passing off, and I start by stating that I agree with the submission made by counsel for the plaintiff company that even though a plaintiff may fail to make out a case of infringement of a trade mark he may yet show that by imitating the mark the defendant has done what is calculated

to pass off his goods as those of the plaintiff company. See Kerley on Trade Marks (8th Edn.), p. 333. But I think it is correct also to say that passing off cases are often cases of deliberate and intentional misrepresentation, although fraud is not usually necessarily an element of the right of action, the absence of an intention to defraud not being a defence to the action.

In the instant case, the registered proprietor of the trade mark complained of, whom I find as a fact to be Messrs. Premchand Bros. Ltd., is not a party to this action. It has therefore not been possible to ascertain how the label of the steamship safety matches had come to be adopted, although I am satisfied and find as a fact that it was registered as a trade mark in Kenya in 1950 and that the first defendant was licensed by Messrs. Premchand Bros. Ltd. to use it only in 1961.

There is no evidence before the court from which to draw any inference as to the intention of the proprietor in designing Exhibit O and registering it as its trade mark for safety matches. There is also no evidence before me of any fraud, or that the design Exhibit O was an imitation of Exhibit A.

The basis of a passing off action being false representation by the defendants, it is the duty of the plaintiff company to prove as a fact that such false representation was made.

In the instant case it was contended for the plaintiff company that a false representation must be implied in the use of the trade mark by the defendants. On a consideration of the whole of the evidence, and having regard to all the circumstances of the case I am satisfied that the use by the defendants of the trade mark in question in connection with their goods, namely safety matches, does not imply any representation that the goods sold by the defendants are the goods of the plaintiff. I am also satisfied that the trade mark Exhibit O is not calculated to deceive anyone.

I hold that the plaintiff has failed to show by evidence that the defendants have by their use of their trade mark represented to the public that their goods are the goods of the plaintiff. In the circumstances I must conclude that the plaintiff's action fails under both heads. It is accordingly dismissed with costs.

Action dismissed.

For the plaintiff:

Hunter & Greig, Kampala

A. I. James

For the defendants:

Russell & Co., Kampala

R. E. G. Russell

Mulji Chhagan v Nanji Nathoo Manani
[1964] 1 EA 71 (HCU)

Division: High Court of Uganda at Kampala

Date of judgment: 27 January 1964

Case Number: 441/1963

Before: Udo Udoma CJ
Sourced by: LawAfrica

[1] Landlord and tenant – Tenancy from year to year – Rent later reduced by mutual agreement – Claim that yearly tenancy then altered to monthly tenancy – Notice to quit given on basis of monthly tenancy – Validity of notice.

Editor's Summary

From 1952 to 1960 the defendant occupied certain premises as tenant from year to year. According to the plaintiff the yearly tenancy was altered in January, 1961, when the rent was reduced by mutual agreement from Shs. 5700/- per annum to Shs. 400/- per mensem, and later to Shs. 350/- per mensem. The defendant denied this and contended that the reduced annual rent was fixed at Shs. 4,800/- and Shs. 4,200/- respectively on terms that the defendant should pay as much as he could afford from time to time within the year. The defendant having been irregular in his payments of rent, the plaintiff in May, 1963 served him with a notice to quit on the basis of a monthly tenancy and later sued for vacant possession. The defendant's case was that he was a yearly tenant and that the notice served on him was therefore invalid.

Held –

- (i) a mere reduction in the amount of rent payable is not sufficient by itself to alter the nature of a tenancy nor can it operate as a new demise;
- (ii) the burden of establishing by satisfactory evidence that the original tenancy had in 1961 undergone novation was heavily upon the plaintiff and on the evidence there had been no change in the nature of the tenancy;
- (iii) the notice to quit was inadequate for a yearly tenancy and, therefore, invalid.

Action dismissed.

Cases referred to in judgment:

- (1) *Oxley v. James* (1844), 13 M. & W. 209.
- (2) *Clarke v. Moore* (1844), 7 Ir. Eq. R. 515.
- (3) *Doe d. Monck v. Geekie* (1844), 5 Q.B. 841.

Judgment

Udo Udoma CJ: This is a claim by the plaintiff against the defendant for: (a) vacant possession of the premises known as Plot No. 25 situate and being at Kira Road, Kampala; (b) Shs. 2,450/-, being in arrears of rent; (c) mesne profits at the rate of Shs. 600/- from August 1, 1963 till possession, etc. The defendant has resisted the claim on the ground that the notice to quit was not valid in law.

The plaintiff is the registered proprietor of the premises known as Plot No. 25 Kira Road, Kampala (hereinafter known as the premises in dispute), having bought the same on August 2, 1952. Prior to the purchase of the premises in dispute by the plaintiff, the defendant was in occupation of the same as

tenant from year to year of the plaintiff's vendor at the annual rental which the plaintiff says was Shs. 5,700/- payable usually in advance, while according to the defendant it was Shs. 6,000/- per annum payable by instalments. In 1952, the plaintiff having bought the premises in dispute, it was mutually agreed between the plaintiff and the defendant that the defendant should continue in occupation of

the same as tenant of the plaintiff but at a reduced rent of Shs. 5,700/- per annum payable in advance.

In pursuance of the said agreement and in furtherance thereof, the defendant continued in occupation of the said premises in dispute as tenant of the plaintiff thereof paying regularly in advance in terms of the said agreement the rent thereby agreed from 1952 to 1960. In January, 1961, at the request of the defendant on the ground that he could no longer afford to pay the sum of Shs. 5,700/- per annum, the rent was by mutual agreement between the plaintiff and the defendant reduced, the plaintiff says to Shs. 400/- per mensem payable in arrears. Thereafter the defendant paid the new rent for six months only and, in July, 1961, as house rent in Kampala generally was dropping, at the request of the defendant and by mutual agreement the rent was again reduced to Shs. 350/- per mensem. Henceforth, it is the plaintiff's case that the defendant, in spite of that reduction, was only paying the rent intermittently and at no regular intervals as to time, making sometimes after a lapse of three months one lump sum payment. The defendant, while admitting that he was in fact irregular with the payment of the reduced rent, says that the rents fixed in January, 1961, and in June, 1961, were at the annual rates of Shs. 4,800/- and Shs. 4,200/- respectively and that it was also a term in the agreement that he should pay as much as he could afford at any time because he was then out of work.

Then in 1962 the plaintiff says the defendant made default in the payment of his rent for a period of six months. Thereupon he consulted an advocate and on his instructions the letter, Ex.A.11, was addressed to the defendant, to which the defendant made no reply. But, in December, 1962 the defendant paid to him the rent due for the whole year in one lump sum.

It is also the case of the plaintiff that in January, 1963, the defendant once more defaulted in the payment of his rent. On his instructions his advocate addressed the letter, Ex.A.10, dated March 2, 1963, to the defendant, and thereafter again on his instructions, after the notice to quit, Ex.A.5, dated May 18, 1963, had been served on the defendant, this action, in which he claims the relief set out above was commenced.

The defendant on the other hand says that on receiving the notice to quit, Ex.A.5, he had explained to the plaintiff that he was not in a position to vacate the premises as the notice was rather short. He had then also pointed out that he was a tenant of the premises from year to year and required longer notice. The plaintiff in answer had informed him that if he wanted to continue in occupation of the premises he must accept to pay an increased rent of Shs. 600/- per mensem. He was unwilling to pay the increased rent and therefore told the plaintiff that as soon as he could find alternative accommodation he would vacate the premises.

The defendant says that he followed up that conversation with a letter, Ex.A.4, dated July 31, 1963, addressed by his advocate to the plaintiff, and thereafter he had tendered the year's rent to the plaintiff, who promptly refused the same.

It is the defendant's case that he is not a monthly but a yearly tenant; that his tenancy of the premises had not been validly determined as no valid notice has been served on him; and that he is entitled to six months' notice to quit.

The most important issues raised in this case for determination as settled by both counsel are: (1) was the defendant's tenancy of the premises in dispute a monthly or yearly tenancy?; and (2) was the notice, Ex.A.5, a valid notice in law? Now it is common ground that from 1952 to 1960 the defendant was in occupation of the premises in dispute as a tenant from year to year. Of that there can be no doubt, and I am satisfied that that has been established by preponderance of evidence. The plaintiff, however, says

that that contract of yearly tenancy was altered when in January, 1961, at the request of the defendant,
the

rent was reduced by mutual agreement from Shs. 5,700/- per annum to Shs. 400/- per mensem, and later to Shs. 350/- per mensem. The defendant has denied this and, on the contrary, says that the reduced rental was fixed at the annual rate of Shs. 4,800/- and Shs. 4,200/- respectively on terms that he should pay as much as he could afford from time to time within the year.

The burden of establishing by satisfactory evidence that the original contract of tenancy had in 1961 undergone a novation is heavily upon the plaintiff. For where a tenancy from year to year continues, as in the instant case, beyond the first year, it is not treated as tenancy determining or recommencing with every year. The tenant has a lease for one year certain with a growing interest during every year thereafter springing out of the original contract and parcel of it. See *Oxley v. James* (1) (13 M.& W., at p. 214).

Mere reduction of the amount of rent payable, I hold, is by itself not sufficient to alter the nature of the tenancy nor can it operate as a new demise. There must be some evidence that at the time when the reduction was mutually agreed and effected both parties did so mutually agree to determine the previous yearly tenancy for a new one.

It cannot be said that the mere payment and acceptance of the reduced rent monthly would be sufficient to constitute abandonment of the defendant's previous yearly tenancy. As was said in *Clarke v. Moore* (2), which is mentioned in Mews Digest, a verbal agreement to accept a less rent than that mentioned in an agreement to grant a lease followed by acceptance thereof is not per se an abandonment of the former contract; nor does it operate as a substitution of a new agreement for a former one, or as the creation of a new tenancy in which the old tenancy merged.

There is no satisfactory evidence before this court sufficient to support the contention of counsel for the plaintiff that the original yearly tenancy of the defendant was duly terminated when the rent of the premises was by mutual consent of the plaintiff and the defendant fixed at Shs. 400/- and subsequently at Shs. 350/- per mensem. Such a serious change in the nature of the defendant's tenancy, which I find had subsisted for over eight years at the time of reduction of rent, I am unable to infer from the circumstances of this case. Strong evidence is required to warrant such an inference. It is highly improbable that such a change did take place. After all, the initiative for reducing the rent had come not from the plaintiff but from the defendant for the very good reason that house rents generally in Kampala were then falling.

I accept the evidence of the defendant and find as a fact that on reduction the rent was fixed by mutual consent at Shs. 4,800/- and at Shs. 4,200/- per annum and that it was part of the arrangement that the defendant should from time to time pay as much of it as he could afford. I am reinforced in this view by the admission of the plaintiff that even in 1961 the defendant was not paying his rent at regular intervals as to time and that sometimes he would only make a lump sum payment after the lapse of three months.

In the old English case of *Doe d. Monck v. Geekie* (3), the defendant therein was a tenant from year to year at a given rent. At the termination of one of the years, by consent of the landlord and the tenant the rent was raised. It was held that if that created a new contract it must be a contract to hold on the old terms; and that a contract for a tenancy for two years certain from the time of raising the rent could not be inferred (in default of additional evidence) even on the assumption that an original contract for a tenancy from year to year creates a tenancy for two years certain.

In his judgment Lord Denman, C.J. said (5 Q.B., at p. 842):

"This may have been a new contract; but its terms must have been

understood to be that all was to go on as under the old contract except as to the amount of rent. That is the commonsense view of the transaction.”

On the evidence, my finding is that there was no change in the nature of the tenancy of the defendant. He was to continue in occupation of the premises as under the old contract, namely, as a tenant from year to year and at the annual rental of Shs. 4,800/-, which was later changed to Shs. 4,200/- as from July 31, 1961.

In the view of the above findings, I am of opinion that the notice, Ex.A.5, is invalid on the ground of inadequacy as the notice was framed and served on the footing that the defendant was a monthly tenant. In the absence of any special stipulation, a yearly tenancy ought to be determined by half a year’s notice to expire at the end of some year of the tenancy.

No argument was addressed to me on the question of arrears of rent. It will therefore not be necessary to deal with that issue or the issue of mesne profits. Finding as I do, that the defendant is a tenant from year to year and therefore requires half a year’s notice for the purpose of determining this tenancy, it follows, I think, that this action must fail. It is accordingly dismissed with costs.

Action dismissed.

For the plaintiff:

Dalal & Singh, Kampala

S. H. Dalal

For the defendant:

Manubhai Patel & Son, Kampala

M. L. Patel

Platinum Housing Co-Operative Society Ltd v Daulat Khanu Noormohamed [1964] 1 EA 74 (SCK)

Division:	Supreme Court of Kenya at Nairobi
Date of judgment:	15 January 1964
Case Number:	10/1963
Before:	Miles J
Sourced by:	LawAfrica

[1] Co-operative society – Arbitration – Arbitration under Co-operative Societies Ordinance – Enforcement of award – Jurisdiction of court to enforce award. Execution – Arbitration – Award – Arbitration under Co-operative Societies Ordinance – Enforcement of award – Award not embodied in decree – Application for execution of award.

Editor's Summary

The applicants, a co-operative society, applied for enforcement of an award made by an arbitrator under s. 55(2)(b) of the Co-operative Societies Ordinance. Section 55(4) of the Ordinance provides that “the award of an arbitrator . . . shall be enforced in the same manner as if the award had been a judgment of a civil court”. The award was not embodied in a decree and for the defendant it was submitted that the court had no jurisdiction under the Ordinance to enforce the award and that, even if the court had such jurisdiction, a decree should first have been drawn up.

Held –

- (i) under s. 55(4) of the Co-operative Societies Ordinance the appropriate civil court has jurisdiction to enforce an award made by an arbitrator under s. 55(2) of the Ordinance provided the correct procedure is followed;
- (ii) as the legislature has used two expressions – judgment and decree – in the Co-operative Societies Ordinance both had acquired a different technical meaning and it was contrary to the accepted canons of construction to treat them

as tautologous; accordingly the word “judgment” in *ibid.*, s. 55(4) could not be construed as “decree”;

- (iii) a judgment cannot be executed until it is embodied in a decree and, as there was no decree, there was nothing before the court which could be legally executed.

Application dismissed.

Cases referred to in judgment:

- (1) *Re Kassam and Karmali* (1938), 18 K.L.R. 29.
- (2) *S. U. Patel v. K. B. Vyas* (1946), 13 E.A.C.A. 15.

Judgment

Miles J: This is a notice to show cause why the applicants should not be granted vacant possession of Flat No. 54, Ngara, Nairobi.

The applicants are a co-operative society established under the Co-operative Societies Ordinance (Cap. 287 Laws of Kenya, 1948). The defendant is a tenant purchaser under an agreement with the applicant. A dispute having arisen between the parties the Commissioner of Co-operative Development appointed Mr. J. K. Havers, Crown Counsel, as an arbitrator under s. 55(2)(b) of the Ordinance.

On January 29, 1963 the arbitrator gave his award. The material part of this reads:

“Mrs. Abdulla be given until February 28, 1963 to pay all the sums due to the Society at that date. If such sum be not paid by that date the Society to be entitled to repossession.”

The applicants allege that the defendant has defaulted in the payment of sums due at February 28, 1963, and they now seek to enforce the award of the arbitrator by obtaining possession of the premises.

Counsel for the defendant contends that this court has no jurisdiction to entertain the application for execution. This involves a consideration of s. 55(4) of the Co-operative Societies Ordinance, Cap. 287 Laws of Kenya, 1948, which provides so far as material that:

“The award of an arbitrator or arbitrators appointed under the provisions of sub-section 2 of this section . . . shall be enforced in the same manner as if the award had been a judgment of a civil court.”

Counsel for the defendant argues that the court has no power to enforce the award, first because the subsection does not expressly confer such power, and secondly because it provides no machinery whereby the award can be filed in or otherwise brought to the notice of the court. He points out that Mayers, J. has Already ruled in this case that the Arbitration Ordinance does not apply so that the provisions of s. 9 cannot be invoked. He contrasts in this respect the provisions of the Workmen’s Compensation Act, 1897. In para. 8 of the Second Schedule it is provided that an award of compensation shall be embodied in a memorandum and that:

“the Registrar of the county court for the district in which any person entitled to such compensation resides shall, subject to such rules, on being satisfied as to its genuineness, record such memorandum in a special register without fee, and thereupon the said memorandum shall for all purposes be enforceable as a county court judgment.”

Counsel for the defendant also draws attention to s. 32(2) of the Increase of Rent (Restriction) Ordinance, 1949, which provides:

“In any case in which such determination or order has been filed by a party the Board shall, on being served with notice of the filing of such determination or order, transmit to the court its record of the proceedings before it and the same shall be filed by the court along with the certified copy of the determination or order.”

On the other hand, s. 68 of the Friendly Societies Act, 1896 in sub-s. (1) provides that the decision in any dispute:

“shall be binding and conclusive on all parties without appeal, and shall not be removable into any court of law or restrainable by injunction; and application for the enforcement thereof may be made to the county court.”

There is no provision there for the filing of the decision, but that is clearly not an impediment to its enforcement by the county court. As counsel for the applicants points out, there is no power conferred upon the Registrar or any other official by the Co-operative Societies Ordinance to enforce or execute decisions or awards. I hold accordingly that, provided the correct procedure is followed, the appropriate civil court has jurisdiction to enforce the award made by an arbitrator under s. 55(2) of the Ordinance.

Counsel for the defendant further contends that even if the court has jurisdiction it is necessary for a decree to be drawn up before the award can be executed. This argument involves the construction of the word “judgment” in s. 55(4). In England, of course, there is no such thing as a decree and what is enforced in the English courts is a final judgment. Counsel for the applicants has cited two decisions in which the wider English construction has been applied to local legislation in Kenya. The first is *Re Kassam and Karmali* (1). There it was held that the word “judgement” under the Bankruptcy Ordinance is not governed by the definition in the Civil Procedure Ordinance. The reason given for this interpretation was that the Bankruptcy Ordinance is practically word for word the same as the English Act and that in neither the Ordinance nor the rules is the word “decree” mentioned. As I shall show in a moment, that is not the case under this Ordinance. The second decision is *S. U. Patel v. K. B. Vyas* (2), where the view was expressed that the term “judgement” in s. 3 of the Limitation Ordinance should be construed as meaning “decree”. The reason given by Sir Joseph Sheridan, C.J. was:

“It is not reasonably possible to read ‘any sum of money secured by any judgment’ in s. 3 as meaning any sum of money secured by the statement given by the judge of the grounds of a decree or order.”

This is a reference to the definition of “judgment” in the Civil Procedure Ordinance which has now been removed. It does not seem to me that either of these decisions is of any assistance in the construction of s. 55(4) of the Ordinance.

In Maxwell on Interpretation of Statutes (11th Edn.), p.3, it is stated that:

“the first and most elementary rule of construction is that it is to be assumed that the words and phrases of technical legislation are used in their technical meaning if they have acquired one.”

As previously stated the word “judgment” is no longer defined in s. 2 of the Civil Procedure Ordinance but a “decree” is defined as:

“the formal expression of an adjudication which, so far as regards the court expressing it, conclusively determines the rights of the parties with regard to

all or any of the matters in controversy in the suit and may be either preliminary or final.”

It is clear that there is a distinction between a judgment and a decree. Section 25 of the Civil Procedure Ordinance provides that “the court, after the case has been heard, shall pronounce judgment, and on such judgment a decree shall follow”, and Order XX, rr. 1 to 4 of the Civil Procedure (Revised) Rules, 1948 contain provisions with regard to the delivery and signing of the judgment. Now it is to be noted that s. 53 of the Co-operative Societies Ordinance provides that “orders made under sections 50,51 and 52 of this Ordinance may be enforced as follows:

- (a) When made by a liquidator or registrar by any court having jurisdiction, in the same manner as a decree of such court:
- (b) When made by a subordinate court of the first class on appeal, in the same manner as a decree of such court in any suit pending therein.”

This section expressly provides that the orders in question may be enforced as if they were “decrees” whereas in s. 55(2) the corresponding term used is “judgment”. It seems to me that when the legislature in the same enactment has used two expressions, both of which have acquired a different technical meaning, it would be contrary to the accepted canons of construction to treat them as tautologous and I am of opinion that the word “judgment” in s. 55(4) is not to be construed as “decree”. It is clear, and I do not think it would be disputed, that a judgment cannot be executed until it is embodied in a decree and this has not been done in the present case. Counsel for the applicants suggests that, if this construction is adopted, the application should be adjourned in order that a decree may be drawn up but I do not think this is the correct course to take. The position is that upon this application for execution there is nothing before the court which can be legally executed. In these circumstances it is not strictly necessary to deal with the merits of the application. I would observe, however, that the application is based upon the footing that the sum of Shs. 4,380/53 is still due from the defendant. It turns out, however, that the instalments have been duly paid up to date save that there was a delay of four days in the payment of the sum due on February 28, 1963. Since that date the defendant has been paying the instalments direct to the applicant’s bank. She has sworn in her affidavit that she sent the duplicate paying-in slip to the Society. The chairman denies receiving the “triplicate” of the slip. There is a dispute as to the manner in which the defendant made previous payments. It would seem, in the circumstances, that there would be grounds for contending that the applicant had waived the technical default on the part of the defendant in February, 1963. The result is therefore that the application is dismissed and I will hear argument as to costs.

Application dismissed.

For the applicants:

Ishani & Ishani, Nairobi

D. N. Khanna

For the defendant:

E. P. Nowrojee, Nairobi

Division: Supreme Court of Kenya at Nairobi
Date of judgment: 13 April 1963
Case Number: 515/1962
Before: Mayers J
Sourced by: LawAfrica

[1] Damages – Carriage of passengers by air – Return tickets issued and bookings confirmed for wedding party – Stipulation that party should return together – Accommodation not provided for party to return together – Two planes chartered – Measure of damages.

[2] Carriage by air – Passengers – Return tickets issued and bookings confirmed for wedding party – Stipulation that party should return together – Accommodation not provided for party to return together – Two planes chartered – Damages.

Editor's Summary

The plaintiffs were all, with the exception of the second plaintiff, members of a party booked to travel by air from Dar-es-Salaam to Bombay for the wedding of the first plaintiff to the second plaintiff, and thereafter to return to Dar-es-Salaam. The journeys between Dar-es-Salaam to Bombay and vice versa were to be performed in two stages, namely, Dar-es-Salaam to Nairobi and Nairobi to Bombay. The second plaintiff was booked to travel with the other plaintiffs on the return journey from Bombay to Dar-es-Salaam. When the bookings were made the defendants were specifically instructed that on the return journey from Nairobi to Dar-es-Salaam, the entire party must travel by the same flight which must be one stopping at the intermediate airports of Zanzibar, Tanga and Mombasa where receptions were being arranged for the party. When the party arrived at Nairobi from Bombay the defendants were unable to take the entire party by the same flight to Dar-es-Salaam as had been stipulated whereupon the plaintiffs chartered two small aeroplanes and travelled direct to Dar-es-Salaam. In an action for general and special damages for breach of contract

Held –

- (i) the defendants had committed a breach of their contract and the plaintiffs were entitled to special damages for the cost of chartering two aeroplanes and the expense of telephone calls incurred;
- (ii) the plaintiffs were also entitled to general damages in the sum of Shs. 400/- for their disappointment at not being received by their friends at the intermediate airports.

Judgment for the plaintiffs in the sum of Shs. 5,740/-.

Cases referred to in judgment:

- (1) *Addis v. Gramophone Co. Ltd.*, [1909] A.C. 488; [1909] All E.R. Rep. 1.
- (2) *Hadley v. Baxendale* (1854), 9 Ex. 431; 156 E.R. 145.
- (3) *Victoria Laundry (Windsor) Ltd. v. Newman Industries Ltd.*, [1949] 2 K.B. 528; [1949] 1 All E.R. 997.

- (4) *Hobbs v. L.S. W. Railway* (1875), L.R. 10 Q.B. 111.
- (5) *Stedman v. Swan's Tours* (1961), Times, 6th November.
- (6) *Bailey v. Bullock*, [1950] 2 All E.R. 1167.
- (7) *Cook v. Spanish Holiday Tours (London) Ltd.* (1960), Times, 6th February.

Judgment

Mayers J: In this suit the plaintiffs were all, with the exception of the second plaintiff, members of a party which were booked to travel by air from Dar-es-Salaam to Bombay to attend the wedding of the first plaintiff to the second plaintiff, and thereafter to return from Bombay to Dar-es-Salaam. The second plaintiff was booked to travel with the other plaintiffs on the return journey from Bombay to Dar-es-Salaam.

The journeys between Dar-es-Salaam and Bombay and vice versa were to be performed in two stages – by one of the defendants’ aeroplanes from Dar-es-Salaam to Nairobi on the outward journey and then by an Air India aeroplane from Nairobi to Bombay, and on the return journey by Air India to Nairobi and from Nairobi to Dar-es-Salaam by the defendants’ aeroplane.

At the time that the bookings were made the travel agency through which they were made was specifically informed that between Dar-es-Salaam and Nairobi on the outward journey and Nairobi and Dar-es-Salaam on the return journey the entire party must travel by the same aeroplane which must be one which stopped at the intermediate airports of Zanzibar, Tanga and Mombasa as receptions were being arranged at those airports for the party.

These requirements were passed on to the defendants and in due course return tickets were issued which in so far as they related to the journey from Nairobi to Dar-es-Salaam were for that journey to be by aeroplane scheduled to leave Nairobi at 8.00 a.m. on February 23, 1962, and to stop for about twenty minutes at each of the intermediate airports, arriving at Dar-es-Salaam at or about 12.30 p.m. in time for the party to attend a luncheon party which had been arranged to greet them there. These reservation were subsequently confirmed by the defendant company on more than one occasion.

The outward journey was performed without untoward incident, and the aeroplane by which the bridegroom’s party travelled duly stopped at Zanzibar, where they were met by some fifty or sixty people; at Tanga, where they were met by some 100 people; and at Mombasa, where they were met by some 100 to 125 people.

The wedding having taken place in Bombay as arranged, the wedding party started on their return to Dar-es-Salaam on February 22, and arrived at Nairobi at about 4 p.m. that afternoon. On arrival the first plaintiff went to the defendants’ counter at the Airport for the purpose of checking that his reservations to Dar-es-Salaam were in order. He was, however, referred by the clerk at that counter to the Air India counter. He explained to the clerk that he had finished with Air India and wanted to check the onward bookings on the defendants’ aeroplane. The clerk at that counter, who was an “inter-line hostess” again told him to check the reservations at the Air India counter. On so doing, the first plaintiff was initially informed that they were awaiting confirmation of the seventh seat by the following morning’s aeroplane, but was subsequently told that the seventh seat had been confirmed.

The plaintiffs then went to the New Stanley Hotel and thereafter to a sundowner. On his ultimate return to the hotel shortly before 11 p.m. the first plaintiff was told that there was a message for him asking him to telephone to the defendants. He did so about 11 p.m. and spoke to a Mr. Cutts, who informed him that there were only three seats available on the aeroplane scheduled to leave next morning. The first plaintiff stressed that the booking of the entire party had been confirmed for seven passengers and that he insisted on all seven travelling together. After further conversation into which it is

unnecessary to enter, Cutts asked if the first plaintiff was prepared to take the three seats only for the morning aeroplane. The first plaintiff reiterated that as receptions had been arranged at intermediate stops and there was to be a large reception including luncheon at Dar-es-Salaam, he was not prepared to accept the three seats.

Between about 12.45 a.m. and 2.15 a.m. the first plaintiff successively had further telephone conversations with a Mr. Patel (who informed him that Mr. Cutts had left and he was in charge) Mr. Cutts, again Mr. Patel, the General Manager of the defendant company, and finally Mr. Patel. According to the first plaintiff's version, which is all the evidence which I have before me, in the course of these conversations the defendants' representatives showed at least a regrettable lack of frankness and possibly deliberate mendacity. I do not, however, propose to enter into details in relation to this aspect of the matter for two reasons; first, had the defendants elected to call evidence it may be that their evidence would have shown that the lack of frankness or possible mendacity on the part of the defendants' representatives was in fact due to misinformation. Secondly, it does not seem to me that the attitude of a defendant in a suit for damages for breach of contract, or even the reason for that breach, can affect the quantum of damages. Thus, in *Addis v. Gramophone Co. Ltd.* (1) ([1909] A.C., at p. 496), Lord Atkinson said:

"In many other cases of breach of contract there may be circumstances of malice, fraud, defamation, or violence, which would sustain an action of tort as an alternative remedy to an action for breach of contract. If one should select the former mode of redress, he may, no doubt, recover exemplary damages, or what is sometimes styled vindictive damages; but if he should choose to seek redress in the form of an action for breach of contract, he lets in all the consequences of that form of action: *Thorpe v. Thorpe*. One of these consequences is, I think, this: that he is to be paid adequate compensation in money for the loss of that which he would have received had his contract been kept, and no more."

The upshot of these conversations was however that the first plaintiff was again informed that it was impossible for arrangements to be made for more than three of the party to travel by the morning aeroplane.

All the plaintiffs attended at the airport on the morning of the 23rd, but found that there were still only three seats available by the morning 'plane. An offer was, however, made that the entire party might travel by the afternoon 'plane. This offer was refused by the first plaintiff because of the receptions which had been arranged at the intermediate stops for the morning journey. Ultimately the defendants' representative, a Mr. Singh, suggested that if the plaintiffs would wait for one hour he would endeavour to obtain another aeroplane to enable them to travel together. This attempt, however, failed as the aeroplane contemplated by the defendants was already in use. Next, the defendants made efforts to charter a 'plane, but were unable so to do. Subsequently, the first plaintiff himself chartered two small 'planes, and the party left Nairobi about 9.30 a.m., travelling direct to Dar-es-Salaam, where they arrived at or about 12.40 p.m. It appears from the correspondence which was tendered in evidence that the reason why the defendants failed to adhere to their contract to carry the seven passengers on the morning 'plane was that a telegram relating to the matter sent from the Dar-es-Salaam office to their Nairobi office was sent in two parts instead of in one part. This counsel for the defendants admitted constituted negligence in law on the part of the defendants. Nothing turns upon the conditions of carriage endorsed upon the tickets issued to the plaintiffs, as no point in relation to this was either pleaded or taken at the trial. In these circumstances, it appears to me that there was clearly a breach of contract by the defendants, and therefore the only question for determination that of the quantum of damages.

The general rule as to the quantum of damages to be awarded for breach of contract was stated by Alderson, B. in *Hadley v. Baxendale* (2) (156 E.R., at p. 151) in the following terms:

“Now we think a proper rule in such a case as the present is this: where two parties have made a contract which one of them has broken, the damages which the other party ought to receive in respect of such breach of contract should be such as may fairly and reasonably be considered either arising naturally, i.e. according to the usual course of things from such a breach of contract itself, or such as may be reasonably supposed to have been in the contemplation of both parties, at the time they made the contract, as the probable result of the breach of it.”

In *Victoria Laundry (Windsor) Ltd. v. Newman Industries Ltd.* (3) Asquith, L.J. in delivering the judgment of the Court of Appeal, after considering the above observations of Alderson, B. and certain other cases, said ([1949] 2. K.B., at p. 539:

“What propositions applicable to the present case emerge from the authorities as a whole, including those analysed above? We think they include the following: – (1) It is well settled that the governing purpose of damages is to put the party whose rights have been violated in the same position, so far as money can do so, as if his rights had been observed: (*Sally Wertheim v. Chicoutimi Pulp Co.*). This purpose, if relentlessly pursued, would provide him with a complete indemnity for all loss de facto resulting from a particular breach, however improbable, however unpredictable. This, in contract at least, is recognised as too harsh a rule. Hence, (2) in cases of breach of contract the aggrieved party is only entitled to recover such part of the loss actually resulting as was at the time of the contract reasonably foreseeable as liable to result from the breach.”

In the light of the foregoing dicta, it appears to me that in general the only damages which can be recovered for a breach of contract are damages in respect of pecuniary loss which is actually sustained by the plaintiff and which was at the time of the making of the contract reasonably foreseeable. The failure to be welcomed by their friends at the various intermediate airports must have occasioned considerable disappointment to the plaintiffs, but I see no reason to believe that it entailed any financial loss to them.

To this general rule however there are certain exceptions. Thus, in *Hobbs v. L. S. W. Railway* (4) a railway passenger who was set down with his family at the wrong station so late at night that they had to walk several miles home was held to be entitled to recover damages in respect of the physical inconvenience occasioned to him. In delivering his judgment Mellor, J. said:

“For the mere inconvenience, such as annoyance and loss of temper or vexation or for being disappointed in a particular thing which you have set your mind upon, without real physical inconvenience resulting, you cannot recover damages.”

Counsel for the plaintiffs contends that the exception to the general rule is sufficiently wide to apply to the instant case. In support of this he relied first upon Precedent 133 in Bullen & Leake’s Precedents of Pleadings (11th Edn.), in which it is alleged as a head of damage that the plaintiff and his family were deprived of the enjoyment of attending his sister’s wedding and suffered considerable distress, anxiety, inconvenience and upset. Further, he relied upon the following passage in Mayne & McGregor on Damages (12th Edn.), at p. 52:

“It may however be respectfully suggested that there is no reason why there could not be exceptions in proper cases to this sound general rule. Just as a failure to pay money will generally attract no damages, at least

beyond interest, because no more is in the parties' contemplation, mental distress likewise does not form a head of damage for the same reason. But the basic criterion is the parties' contemplation and the scope of the contract, and, just as the Court of Appeal has spoken cautiously about whether the rule as to non-payment of money is without exception, one may justifiably be equally cautious as to a dogmatic rule in the case of mental suffering. The reason for the general rule is that contracts normally concern commercial matters and that mental suffering on breach is not in the contemplation of the parties as part of the business risk of the transaction. If however the contract is not primarily a commercial one, in the sense that it affects not the plaintiff's business interests but his personal, social and family interests, the door is not closed to awarding damages for mental suffering should the court think that in the particular circumstances the parties to the contract had such damage in their contemplation."

In *Stedman v. Swan's Tours* (5) (a typed copy of a report of which from the *Times* newspaper was handed in) damages were awarded in respect of the giving of inferior accommodation to a holiday maker.

Likewise in *Bailey v. Bullock* (6), it was held that the plaintiff who was forced to live with his wife's relatives in a small house for some two years owing to the negligence of the defendants in failing to take prompt steps to recover possession of a house of which the plaintiff was the owner, and which he desired for his own occupation, was entitled to recover damages for the inconvenience which he suffered.

Both *Bailey v. Bullock* (6) and *Stedman v. Swan's Tours* (5) seem to me to be reconcilable with the dicta of Mellor, J. already set out on the grounds that in each case the plaintiffs suffered some measure of physical discomfort. They cannot therefore be regarded as authorities in the instant case, as although the plaintiffs undoubtedly suffered great disappointment at not being received by their friends I see no reason to believe that they suffered any physical inconvenience thereby.

The case most nearly in point seems to me to be that of *Cook v. Spanish Holiday Tours (London) Ltd.* (7). In that case the facts were that the plaintiff had booked a "honeymoon holiday" at an inclusive cost of £104 at a hotel in Spain from September 3 to September 12, 1958. On arriving with his wife at his destination the plaintiff found that there was no accommodation for them and they were offered accommodation in an annex in a room which was filthy and had beetles in one corner. They refused this accommodation and returned to England. In the course of his argument before the Court of Appeal, counsel for the plaintiff submitted that the plaintiff was entitled to compensation for "the loss of a pleasant memory of a honeymoon holiday. He had also lost three days of his honeymoon". Lord Goddard interpolated, "I don't suppose Mr. and Mrs. Cook would have the disappointment for £1,000 – but we cannot give them that." In delivering the judgment of the court, Lord Goddard said:

"Mr. Cook was entitled to recover £62 for expenses in returning to London. The £104 would have to be returned and there would be a further £25 for the disappointment suffered."

This seems to me to be clear authority that in this class of case damages can be awarded for disappointment as opposed to physical inconvenience.

In the instant case, as I have already observed, the plaintiffs in my view suffered disappointment which was cognate to that suffered by the plaintiff in *Cook v. Spanish Holiday Tours (London) Ltd.* (7).

Quite clearly the plaintiffs are entitled to recover the actual loss incurred by them consequent on the failure of the defendants to carry out their contract.

That loss represents the cost of chartering two aeroplanes which was admitted at Shs. 5,040/-, and a further Shs. 300/- which it was not disputed was the expense incurred by the first plaintiff in relation to telephone calls including one to his father at Dar-es-Salaam.

The defendants admitted their liability in respect of this sum upon condition that the unused portions of the return tickets be surrendered to them. Those unused portions were in fact so surrendered during the course of the hearing. Counsel for the defendants then renewed the defendants' offer to the plaintiffs, but that offer was rejected. Counsel, as I understood his argument, contended that by reason of the defendants' admission of liability in respect of this sum, no costs ought to be awarded to the plaintiffs, or alternatively, no costs should be so awarded subsequent to the repetition of the offer in open court. With that view I do not agree. There was no payment in of the sum admittedly due by the defendants, and in the absence of payment in, it seems to me that the plaintiffs ought not to be deprived of any portion of their costs.

For the foregoing reasons there will be judgement for the plaintiffs for the sum of Shs. 5,340/- by way of special damages, and for the further sum of Shs. 400/- by way of general damages for "disappointment", with costs. The suit involved a not unimportant question of law, and I therefore certify that it is a proper case for the employment of Queen's Counsel and a Junior and for costs to be taxed upon the higher scale.

Judgment for the plaintiffs in the sum of Shs. 5,740/-.

For the plaintiffs:

Khanna & Co., Nairobi

Bryan O'Donovan, Q.C. and D. N. Khanna

For the defendants:

Kaplan & Stratton, Nairobi

J. A. Mackie-Robertson

Peterson Ontumbi v R
[1964] 1 EA 83 (SCK)

Division:	H.M. Supreme Court of Kenya at Nairobi
Date of judgment:	6 October 1963
Case Number:	1121/1963
Before:	Rudd and Wicks JJ
Sourced by:	LawAfrica

[1] Agriculture – Tea industry – Licensed grower – Obstruction – Grower with more tea planted than authorised – Tea not planted on approved land – Explanation to duly authorised person refused – Tea

Ordinance (Cap. 343), s. 14 (K).

Editor's Summary

The appellant was charged with obstruction contrary to s. 14(2) of the Tea Ordinance and with planting tea on land not approved and prepared to the satisfaction of the Director of Agriculture contrary to para. 18 (n) of the Agricultural (Special Crops Development Authority) Order, 1961 and the Special Crops Development Authority (Cultivation of Tea) Order, 1961, as amended by Legal Notice 219 of 1963. Evidence showed that the appellant was licensed to plant 1700 tea stumps and by 1962 had purchased and planted those, that in June, 1963, one, Edmonson, a duly authorised person, had visited the appellant's plantation where he saw 2083 stumps of which 268 had been planted less than twenty-four hours before and not on the contours of the land as they should have been and that the appellant when questioned refused to say where he had obtained the stumps. The magistrate accepted this evidence and convicted and sentenced the appellant. On appeal,

Held –

- (i) since the appellant was in breach of the terms and conditions of his licence and the questions put related to a suspected breach, the information requested was “reasonably required” within the terms of sub-s. (2) of s. 14 of the Ordinance; the appellant having failed to reply, he was guilty of obstruction as charged, and rightly convicted;
- (ii) by planting the 268 tea stumps on unapproved land, the appellant was in breach of para. 6 (a) of the Agriculture (Special Crops Development Authority) (Tea Cultivation) (Amendment) Order, 1963 and was properly convicted.

Appeal dismissed.

Judgment

Rudd J read the following judgment of the court: The appellant, Peterson Ontumbi, was convicted by the Resident Magistrate, Kisii, on August 3, 1963, of obstruction contrary to s. 14(2) of the Tea Ordinance (Cap. 343), and of planting tea on land that had not been approved and prepared to the satisfaction of the Director of Agriculture, contrary to para. 18 (n) of the Agriculture (Special Crops Development Authority) Order, 1961, of the Agriculture Ordinance (Cap. 318), as read with s. 6 of Legal Notice No. 740 of 1961, and was fined Shs. 1,000/- or 60 days in a detention camp in default on each charge. The appellant appeals against the conviction and sentence on each charge.

The evidence relating to the first charge was that on June 27, 1963, a Mr. Edmonson visited the shamba owned by the appellant and saw there tea stumps and tea seeds which he had reason to believe had been acquired otherwise than by purchase from the proper authority. Mr. Edmonson then met the appellant and asked him where the tea stumps and tea seeds came from. The appellant steadfastly refused to answer even though Mr. Edmonson warned him that if he persisted in such refusal he would be arrested. There was ample corroboration of Mr. Edmonson’s evidence which was accepted by the magistrate. The magistrate did not accept the appellant’s evidence and we are satisfied that the magistrate was correct in accepting the evidence for the prosecution. The question is, by his failure to answer did the appellant commit the offence charged?

Section 14 of the Tea Ordinance (Cap. 343), of the Laws of Kenya is:

- “14(1) Any person duly authorised in writing in that behalf by the Board may, at all reasonable times and on production of his authority to any person requiring, enter upon any land and buildings occupied by a licensee, or by the holder of a manufacturing licence issued under section 13 of the Ordinance, and may make such inspection and enquiries as he thinks fit for ascertaining whether the provisions of this Ordinance, and of any regulations made thereunder, and the terms and conditions of the licence, are being complied with, and may require any person found thereon to give to him such information as he may reasonably require.
- (2) Any person who hinders or obstructs any person duly exercising or attempting to exercise any of the powers conferred by subsection (1) of this section or who fails to give to the best of his ability any information reasonably required of him under that subsection shall be guilty of an offence.”

It is not disputed that Mr. Edmonson is a “person duly authorised in writing . . . by the Board”, but was the information he demanded from the appellant relevant and reasonably required for the purpose of “ascertaining whether the provisions of this Ordinance, and of any regulations made thereunder, and the

terms and conditions of the licence, are being complied with”?

Section 8(1) and (2) of the Tea Ordinance provides:

- “(1) Any person who plants or grows any tea otherwise than under and in accordance with the terms and conditions of a current planting licence issued to him by or on behalf of the Board under this section, or transferred to him in accordance with section 11 of this Ordinance, shall be guilty of an offence.
- (2) The Board may issue a planting licence subject to such terms and conditions as it may think fit, or after consultation with the Director, may refuse to issue a planting licence on any ground which may appear to the Board to be sufficient.”

It is not disputed that the appellant is a licenced tea grower under the Ordinance and in his evidence Mr. Edmonson said, “He is registered for 1,700 tea stumps. In 1960 he purchased 200 stumps and in 1962 he purchased a further 1,500 stumps”, that is, the appellant had planted all the tea bushes he was entitled to plant under the terms of his licence. Mr. Edmonson continued, stating that he saw stumps that had been planted within 24 hours of his arrival, that they numbered 268 and the total on the appellant’s shamba was 2,083. The magistrate accepted this evidence and from it, it would appear that the appellant was in breach of the terms and conditions of his licence; this being so and the questions relating to the suspected breach, the information was “reasonably required” within the terms of sub-s. (2) of s. 14 of the Ordinance, and the appellant having failed to reply he was guilty of the obstruction as charged, and was rightly convicted.

The second charge related to the same 268 stumps, the particulars alleged being that the appellant planted these on land that had not been approved by, and prepared to the satisfaction of, the Director of Agriculture. The question is, is it a necessary requirement that the Director of Agriculture approve land, and that such land be prepared to the satisfaction of the Director of Agriculture, before tea is planted? And, if so, did the appellant plant tea on land not so approved and which was not so prepared? Under s. 190 of the Agriculture Ordinance (Cap. 318), Laws of Kenya, the Minister has power to declare a particular crop to be a special crop and this was done in respect of tea by the Agriculture (Declaration of Special Crops) (Tea) Order, L.N. 242 of 1961. Tea having been declared to be a special crop, s. 191 of the Ordinance gives the Minister power to establish an authority for promoting and fostering the development of that crop which, in the case of tea, was done by the Agriculture (Special Crops Development Authority) Order, L.N. 243 of 1961 and L.N. 540 of 1961. An order having been made under s. 191 of the Ordinance, s. 192 provides that the order establishing the authority under s. 191 may make provision for certain matters, particularly enabling the authority to make orders, sub-s. (1)(h)(x) being:

“With the approval of the Minister, to do such other things as in the opinion of the Authority will assist in the development of crops in the area for which the Authority is established.”

In exercise of this power reg. 18 (n) of L.N. 243 of 1961 (referred to in the charge) provides in part:

“18. The Authority shall be empowered to do the following things:

.....

(n) with the approval of the Minister, by order published in the Gazette:

.....

- (iv) provide for any other matter which is approved by the Minister as being in the furtherance of the development of tea or incidental or conducive to the exercise of any of the powers of the authority.”

In exercise of this power the Authority made an order, which was approved by the Minister, and referred to as the Special Crops Development Authority (Cultivation of Tea) Order, 1961, L.N. 740. This order was amended by the Agriculture (Special Crops Development Authority) (Tea Cultivation) (Amendment) Order, 1963, L.N. 219 of 1963, para. 6 of which provides:

“No planting of tea shall take place in any area until:

- (a) the land upon which it is proposed to plant tea has been approved by the Authority;
- (b) any measure necessary to conserve the soil has been taken;
- (c) the land is cleared, cultivated and all woody material has been removed from the soil; and
- (d) holes for the planting of tea have been dug:

Provided that on sloping land such holes shall be on the contour and shall be 9 inches in diameter and 18 inches in depth.”

The evidence of Mr. Edmonson was that the land on which the 268 trees were found had not been approved by the Authority. Mr. Edmonson explained that the procedure was that when land has been approved by the Authority, an Agricultural Department surveyor chains the land on the contour and marks it out with sticks 5 feet between rows and 3 feet apart in the rows, and continued that the appellant’s shamba where he saw the 268 trees, was not planted on the contour as it would have been had the land been chained by an Agricultural Department surveyor. The magistrate accepted this evidence and the appellant being in breach of para. 6 (a) and the proviso to that order (set out above), as alleged in the particulars to the charge, was properly convicted.

As far as the sentences imposed are concerned, the appellant is a member of the District Tea Committee. The second offence is a flagrant breach of regulations which appear to have been designed to further the prosperity of the tea industry. As a member of the committee the appellant could be expected not only to see that the regulations were complied with by other tea growers but also set an example. In the circumstances we are satisfied that the sentences can in no way be considered excessive.

The appeal against conviction and sentence is dismissed.

Appeal dismissed.

The appellant did not appear and was not represented.

For the respondent:

The Attorney-General, Kenya

K. C. Brookes (Director of Public Prosecutions, Kenya)

Punjani Motors Ltd v Padhani’s Ltd
[1964] 1 EA 87 (HCU)

Division: High Court of Uganda at Kampala

Date of judgment: 20 February 1964

Case Number: 375/1963
Before: Sheridan J
Sourced by: LawAfrica

[1] Customs – Import duty – Goods sold but not delivered – Purchase price paid – Import duty on goods increased after sale but before delivery – No evidence that goods entered for home consumption – Whether seller entitled to add increase of duty to price – Customs Tariff Ordinance, s. 7 (U) – East African Customs (Management) Act, 1952, s. 2(2)(a).

Editor's Summary

The plaintiffs, who were motor dealers, agreed to buy a car from the defendants which they paid for and delivery of which was to be made forthwith. The time for delivery was by agreement extended by seven days but the car was never delivered to the plaintiffs. Meanwhile the import duty on cars was increased and in proceedings by the plaintiffs for loss of the profit which they would have made on resale of the car had it been delivered to them and for interest on the purchase price paid, the defendants contended that by virtue of s. 7 of the Customs Tariff Ordinance they were entitled to add the increased duty to the purchase price.

Held –

- (i) the defendants were not entitled to invoke s. 7 of the Customs Tariff Ordinance because they had failed to prove the date of entry of the car for home consumption;
- (ii) nor could s. 7, *ibid.* be invoked on account of a mere extension of time of the delivery date under the original contract;
- (iii) the plaintiffs were entitled to loss of the profit which they would have made on resale of the car and also to interest on the purchase price paid as they were deprived of the use of that sum by the defendant company's breach of contract.

Judgment for the plaintiffs for Shs. 2,977/68.

Case referred to in Judgment:

- (1) *Kulukundis v. Norwich Union Fire Insurance Society*, [1936] 2 All E.R. 1488.

Judgment

Sheridan J: The plaintiff company claims (1) Shs. 3,650/- loss of profit which they would have made on the resale of a new Peugeot 404 Saloon car if the defendant company had not refused to deliver it to them, (2) Shs. 342/88 interest at 6 per cent. on Shs. 16,545/-, the balance of the price of the said vehicle of which they had been deprived from February 5 to June 11, 1963.

The plaintiffs are motor dealers in Kampala. The defendants are the sub-agents in Fort Portal of General Motors Limited for the sale of Peugeot cars. It is a rule of General Motors that their sub-agents are not allowed to sell unregistered vehicles to other dealers (Ex.A.12). It would be to the advantage of

such dealers to be able to display new unregistered vehicles in their showrooms to attract custom and to obtain the highest possible price.

On February 5, 1963, Mohamed Punjani (P.W.1), a director of the plaintiff company, purchased a new Peugeot 403 and a new Peugeot 404 from the defendants. Arkarali Padhani (D.W.1) the defendant's managing director concluded the bargain after, as I find, he had checked with General Motors that the vehicles were in stock. The invoice (Ex.A.1) was prepared and Shs. 31,770/- was paid.

Mr. Padhani paid General Motors. Delivery was to be effected through Jayantilal Gajjar (D.W.3) of Gajjar Services. The plaintiff avers that delivery was to be within 7 days, but I am satisfied that no time limit was specified, the vehicles being readily available. I accept the evidence of Mr. Dhalla (P.W.2), another director of the plaintiff company, that on February 6 Mr. Padhani promised to make delivery forthwith. He inquired what colours the plaintiffs would like for the vehicles. They opted for a beige 403 and a light green or gray 404. A beige 403 was in stock with General Motors and it was duly delivered. There was only a black 404, and I accept the evidence of Mr. Punjani that Mr. Padhani promised to deliver a 404 of the required colour from the next consignment of General Motors within 7 days. No 404 was ever delivered, although it is clear from an unanswered telegram (Ex.A.3) and two unanswered letters dated March 4 and April 23 (Exs.A.4 and 5) that the plaintiffs were pressing for delivery. There was no question of the tender of a black 404 saloon or of the refusal by the plaintiffs to accept it thereby discharging the defendants from their contractual obligation. The reason for the non-delivery is to be found in the threatening letter of General Motors to the defendants dated March 4 (Ex.A.12) calling their attention to the breach of the rules regarding the sale of new unregistered vehicles. This followed on the appearance of the 403 beige saloon in the plaintiffs' showroom. I find that the defendants were in breach of their contract to deliver the 404 saloon. They knew it was required for resale. No question of mitigation of damages arises because the plaintiffs had parted with the purchase price to the defendants and were still hoping to get a 404 from the defendants, at least up to April 26 (Ex.A.5), the agreed deferred date of delivery. This brings me to the effect of s. 7 of the Customs Tariff Ordinance, because on April 17 the import duty on Peugeot 404's was increased so that the selling price became Shs. 20,300/-, and the defendants contend that by virtue of the section they were lawfully entitled to add this increased duty to the selling price. Section 7 reads:

"7. If, after any agreement has been entered into for the sale or delivery of any goods, at a price inclusive of import duty or suspended duty and alteration takes place in the rate of amount of duty so included before such goods are entered for home consumption, then, in the absence of express written provision to the contrary, the agreement shall have effect as follows:

(a) in the event of the alteration being a new or increased duty, the seller, after payment of the new or increased duty may add the difference caused by the alteration to the agreed price;"

"Enter" is defined in s. 2(2)(a) of the East African Customs (Management) Act, 1952 as follows:

"Goods shall be deemed to be entered when the entry, made and signed by the owner in the prescribed manner, is accepted and signed by the proper officer at the port of importation, warehousing, or exportation, as the case may be, and when any duty due or deposit required under this Act in respect of the goods has been paid, or security has been given for compliance with the provisions of this Act."

Before the defendants can bring themselves within the section they must prove the facts set out in it, viz. the date of the entry of the goods for home consumption. They have not done so. Nor can it be invoked where there has been a mere extension of time of the delivery date under the original contract. It could have applied if the original contract had provided for delivery on a date after April 17.

Counsel for the plaintiffs conceded that the plaintiffs' loss of profit at 10 per cent. must be reduced to 5 per cent. as they would have to allow a customer a 5 per cent. discount on a cash sale. This reduces their claim by Shs. 1015/- to Shs. 2635/-.

The claim for interest succeeds as a court will generally award interest wherever it is possible to say that for a stated period the plaintiff has been deprived of the use of a definite sum of money on account of the defendants' breach of contract: *Kulukundis v. Norwich Union Fire Insurance Society*, [1936] 2 All E.R. 1488.

There will be judgment for the plaintiffs for Shs. 2,977/68 with interest and costs.

Judgment for the plaintiffs for Shs. 2,977/68.

For the plaintiffs:

Wilkinson & Hunt, Kampala

R. E. Hunt

For the defendants:

Ponda & Asaria Kampala

V. N. Ponda

Uganda v Mushraf Akhtar
[1964] 1 EA 89 (HCU)

Division:	High Court of Uganda at Kampala
Date of judgment:	18 January 1964
Case Number:	168/1963
Before:	Slade J
Sourced by:	LawAfrica

[1] *Criminal law – Charge – Theft – Advocate – Moneys received from one client for payment to another – Advocate acting for both parties – Stakeholder – Part of money used by advocate for own benefit – Particulars alleging theft from client who was to receive money – Theft of whole amount alleged – Whether offence committed as charged.*

[2] *Criminal law – Charge – Amendment – Defect – Particulars of offence – Theft – Advocate – Money received from one client for payment to another – Advocate acting for both parties – Part of money used by advocate for own benefit – Theft alleged of property of client who was to receive money – Finding by magistrate that money belonged to client who had paid advocate – Charge not amended at trial – Whether charge should have been amended after evidence closed.*

Editor's Summary

In 1962 the Bigisu Coffee Marketing Association wished to acquire an interest in a company of which the respondent, an advocate, was secretary and the directors of which were one Mackawi and the

respondent's father, who died in September, 1962. The respondent after discussing the matter with Mackawi, prepared a document which Mackawi signed and which purported to authorise the respondent to sell certain shares and assets of the company to the Association. The respondent also prepared two further documents, one of which was an agreement between himself and the Association whereby the Association undertook to pay Shs. 65,000/- for the appointment of the directors of the Association as directors of the company. Of this consideration Shs. 39,000/- was expressed as payable on execution of the document. In fact, a cheque for Shs. 40,000/- was paid by the Association to the respondent, who by then was acting for both parties. The respondent then opened two bank accounts into one of which, an office account, he paid Shs. 39,000/- and into the other, a client account, he paid Shs. 1,000/-. By a further agreement prepared by the respondent Mackawi agreed to sell 20 of his 30 shares in the company to the respondent for Shs. 20,000/-, of which Shs. 5,000/- was payable immediately. The respondent accordingly gave Mackawi a cheque for Shs. 5,000/- drawn upon his office account. The respondent also drew another cheque upon the office account for his own use and benefit. Subsequently, the respondent was charged with theft, the particulars of the offence being that he had stolen Shs. 39,000/-, the property of Mackawi. The magistrate found that the Shs. 39,000/- was not the property of Mackawi and

that in law the position of the respondent, when he received the money, was that of a stakeholder on behalf of the Association. The magistrate accordingly acquitted the respondent. On appeal by the Director of Public Prosecutions the grounds of appeal were that the magistrate erred (a) in holding that the respondent had received the money in question on behalf of the Association; (b) in holding that by reason of his finding he had no alternative but to acquit the respondent; (c) in failing to convict the respondent irrespective of his finding, when he was satisfied that the respondent had stolen Shs. 39,000/-, and (d) in failing to exercise his discretion to amend the charge by substituting the name of the Association for the name of Mackawi in the particulars of the charge.

Held –

- (i) since he was acting for both parties the respondent was a stakeholder and the sum of Shs. 39,000/-, the subject of the charge, remained the property of the Association at all material times;
- (ii) the magistrate was justified in acquitting the respondent because the question whether the respondent stole money from the Association was never in issue at any stage of the trial;
- (iii) the need to consider an amendment of the charge did not arise until after the conclusion of the evidence when the magistrate was considering the law prior to writing his judgment; the suggested amendment would have entailed a major reconstruction of the charge; accordingly the magistrate acted properly in not exercising his discretionary power to amend the charge.

Appeal dismissed.

Cases referred to in judgment:

- (1) *Edgell v. Day* (1865), 13 L.T. (N.S.) 328.
- (2) *Gill v. R.*, [1963] 2 All E.R. 688; 47 Cr. App. Rep. 166.
- (3) *Hibbert v. McKiernan*, [1948] 2 K.B. 142.
- (4) *R. v. Yule*, [1963] 2 All E.R. 780.

Judgment

Slade J: This is an appeal by the Director of Public Prosecutions from the acquittal of the respondent by the District Court of Mbale (Combined Districts) at Mbale.

The respondent was charged in that court with theft contrary to s. 252 of the Penal Code, the particulars of the offence being that on or about October 13, 1962 he stole the sum of Shs. 39,000/- the property of one Mahfood Saleb Mackawi, and after a lengthy trial the learned magistrate found that the evidence did not support the charge in that the sum of money in question was not the property of Mackawi and that in consequence he had no alternative than to acquit the respondent, which he proceeded to do.

From that acquittal the Director of Public Prosecutions now appeals on the grounds that the learned magistrate erred in law: (a) in holding that the respondent received the sum of money in question on behalf of the organisation known as the Bugisu Coffee Marketing Association (hereinafter referred to as the “Association”); (b) in holding that by reason of his finding on that question he had no alternative but

to acquit the respondent; (c) in failing to convict the respondent, irrespective of his finding, when he was satisfied that the respondent had stolen Shs. 39,000/-; and (d) alternatively, having found that the money in question was received by the respondent on behalf of the Association, in failing to exercise his discretion to amend the charge against

the respondent by substituting the name of the Association for the name of Mackawi occurring in the particulars of the charge.

The respondent is an advocate of the High Court and practises in Mbale, and the prosecution arose from his activities in connection with a transaction between Uganda Hides and Skins Exporters Ltd. (hereinafter referred to as “the company”) and the Association. The company is a private company, the directors having been Mackawi and the respondent’s father, and the respondent was apparently the secretary of the company. In September, 1962, the respondent’s father died and it was not disputed that at all material times the vacancy in the directorate of the company had not been filled nor had the executors named in the will of the deceased obtained probate of that will. The respondent was not an executor of that will.

It would appear that the Association was interested for a variety of reasons in acquiring an interest in the company, and on September 27, 1962, the respondent discussed the matter with Mackawi who said that he would sell a part of his shareholding in the company. In the event Mackawi signed a document (Ex. 1) prepared by the respondent, which everyone in the court below seems to have regarded as an authority given by Mackawi to the respondent to sell shares and certain assets of the company to the Association. Mercifully, I am not required for the purposes of this appeal to interpret this remarkable document. To describe it as the product of illiteracy is to understate the case, and one is astonished to learn that it was prepared by a member of what is still regarded as a learned profession.

It then appears that armed with that authority – to use a neutral expression – the respondent entered into negotiations with a Mr. Muduku, the managing director of the Association, and in the event, on October 12, 1962, the respondent prepared two more documents after suggesting that it was unnecessary that the Association should have separate legal advice and that it would save costs if he acted for both parties. To this suggestion Mr. Muduku agreed, and I have no doubt that he had subsequently regretted his acquiescence in the respondent’s offer of legal assistance.

The two documents to which I have referred are, first, an agreement (Ex. 6) between the executors named in the will of the respondent’s deceased father and the Association for the sale to the latter of a certain building (used by the company) for the sum of Shs. 10,000/- of which Shs. 1,000/- was expressed to be paid at the time, and, secondly, an agreement (Ex.10) between the respondent and the Association, the former describing himself as “the negotiator”. The latter document, in its way as remarkable as the “authority” on which I have had occasion to comment, is one which is equally difficult of interpretation. It is a strange mixture of misspellings, imperfectly understood legal expressions and alterations, and so far as I am able to understand its terms, purports to be an agreement whereby the Association undertook to pay the sum of Shs. 65,000/- for the appointment of the Association’s directors as directors of the company. The sum of Shs. 65,000/- was expressed to be payable as to Shs. 39,000/- on the execution of the document, as to Shs. 20,000/- at the end of December, 1962, and as to the balance (expressed to be Shs. 5,000/-) when renewal of the necessary licences for 1963 was effected. I would observe that the total of those three instalments is less than the amount expressed as the total monetary consideration for the transaction.

The respondent, having received in respect of those two documents a cheque drawn by the Association for Shs. 40,000/- opened on the following day two accounts with the Mbale Branch of National & Grindlays Bank, into one of which, an office account, he paid Shs. 39,000/-, and into the other, a client account, he paid Shs. 1,000/-.

On these facts the learned magistrate found that the sum of Shs. 39,000/-

was not the property of Mackawi and that in law the position of the respondent, when he received the money, was that of a stakeholder on behalf of the Association. I did not have the benefit of any submissions from the learned State Attorney as to the law relating to stakeholders, and in consequence I was compelled to carry out my own research into the matter.

According to Cordery on Solicitors (4th Edn.), at p. 122, where a vendor's solicitor receives *as such* a deposit upon a purchase he does not hold it, like an auctioneer, as a stakeholder, but as agent for the vendor and must pay it on demand. The authority for this proposition appears to be the case of *Edgell v. Day* (1865), 13 L.T. (N.S.) 328. In that case the owner of property instructed his solicitor to act as his agent in the sale of certain property and as such the solicitor received moneys deposited by the purchasers who were represented by other solicitors. The owner claimed the deposits from the solicitor who claimed to be in the position of a stakeholder and as such ought to retain the deposits until the purchases were completed or until he had authority from the purchasers to pay them to the vendor. It was held that on the facts the defendant was agent for the vendor and so bound to pay the deposits to his principal. In the course of his judgment, however, Erle, C.J. said "If a person acts as attorney for both parties he is a stakeholder", and with that unequivocal statement defining the position of an advocate who acts for both vendor and purchaser upon an intended sale of property, I respectfully agree.

I am therefore of the opinion that the sum of Shs. 39,000/-, the subject of the charge, remained the property of the Association at all material times, and I am not persuaded that the learned magistrate erred in his conclusion.

I turn to consider the remaining grounds upon which this appeal is based. I have earlier endeavoured to summarise briefly certain facts relating to the position of the respondent in relation to the company and to the Association. I think it unnecessary to deal with the evidence relating to the respondent's activities after the opening of the two bank accounts in any detail, but it is necessary shortly to examine certain events subsequent to the opening of the bank accounts to which I have earlier made reference.

There was some evidence that on October 23, 1962 the respondent informed Mackawi that the Association was no longer interested in the proposed purchase and it is clear that, whether or not Mackawi was aware that the Association had deposited Shs. 39,000/- on that date, the respondent prepared a document (Ex.2), the effect of which appears to be an agreement for the transfer from Mackawi of 20 of his 30 shares in the company to the respondent for the sum of Shs. 20,000/-, of which Shs. 5,000/- was payable immediately. Mackawi by the terms of that agreement also undertook to assist the directors of the Association in securing directorships in the company. The respondent gave to Mackawi a cheque for Shs. 5,000/- and that cheque was debited to his office account at the Bank.

On October 24, 1962, the respondent bought a tape recorder for Shs. 761/-, of which Shs. 600/- was paid by cheque drawn on the office account at the Bank.

As I see it, the case for the State in the court below was that the respondent, in breach of the provisions of the Advocates Accounts Rules contained in the First Schedule to the Advocates Ordinance, 1956, paid clients' money into his own account instead of into the client account and thus converted that money to his own use. It is clear that the evidence relating to the cheque of Shs. 5,000/- given to Mackawi and to the cheque of Shs. 600/- given in part payment for the tape recorder, coupled with the fact that at all material times there were no funds in the office account other than those provided by the deposit of Shs. 39,000/- are intended to corroborate a fraudulent intent on the part of the respondent.

That being so, the submission for the State on this appeal, as I understand it, is that it was open to the learned magistrate, notwithstanding that the particulars of the offence set out in the charge alleged that the money was the property of Mackawi, to convict the respondent of the theft of Shs. 39,000/-, either specifying that it was the property of the Association (if he were satisfied that that was indeed so) or without specifying the ownership of that property, and that he erred in law in failing to do so.

In making these submissions, which are relevant to the second and third grounds upon which the petition of appeal is based, the learned State Attorney relied on the provisions of s. 136(c)(i) of the Criminal Procedure Code which is in the following terms:

“... the description of property in a charge or indictment should be in ordinary language, and such as to indicate with reasonable clearness the property referred to, and if the property is so described it shall not be necessary ... to name the person to whom the property belongs or the value of the property.”

I was also referred to the recent case of *Gill v. R.* (2) which was a case in which certain property was, by a slip, described as belonging to “A. B. Hicks Ltd.” instead of “A. B. Meeks Ltd.”. On appeal from conviction it was submitted that the misdescription of the owner rendered the conviction invalid. In the course of the judgment of the Court of Criminal Appeal, Edmund Davies, J. said that the court rejected that submission and after setting out the provisions of r. 6 of Schedule I to the Indictments Act, 1915 (which is in terms similar to the provisions of s. 136(c)(i) of the Criminal Procedure Code), said:

“There was ... a sufficient description of the property referred to for it to be identified with certainty, and the addition of the proprietor’s name was, having regard to the nature of the charges ... mere surplusage. As Lord Goddard, L.C.J., said in *Hibbert v. McKiernan* (3) ([1948] 2 K.B., at p. 151): ‘At the present day, allegations concerning the ownership of stolen property are, except in a few exceptional circumstances, immaterial.’ “

It may well be the case that had there been clear and unequivocal evidence that, irrespective of whether the sum of Shs. 39,000/- was the property of the Association or of Mackawi, the respondent had converted it to his own use, and the misdescription of ownership in the particulars alleged had not in any way embarrassed the respondent in making his defence, the magistrate might have been entitled to convict as it is suggested that he should, but in my opinion there are two objections to his doing so.

In the first place, it is by no means clear, in my opinion, on the evidence that if the respondent did steal an amount of money, the sum stolen amounted to Shs. 39,000/-. The fact that he paid the money into his own office account at the Bank rather than into the client account, while it may entail a breach of a statutory obligation, does not in my opinion, of itself, necessarily mean that the respondent converted that sum. I think I need only refer to the case of *R. v. Yule* (4) as authority for that proposition.

It may well be that the evidence before the learned magistrate was such as to establish, if he believed it, that the respondent, *prima facie*, fraudulently converted part of the money, namely Shs. 5,000/- and Shs. 600/- (and I emphasise that I am not finding that he did), but the fact remains that that was not the prosecution case and it was certainly not one to which the respondent was invited to make his defence.

Secondly, had the owner of the property alleged to have been stolen been

misdescribed by slip or had his name been omitted altogether, there may have been, indeed there would have been, grounds for saying that the learned magistrate may have erred in acquitting the respondent. I am not persuaded that he did so in the instant case. The respondent had transactions with both Mackawi and the Association and the misdescription of the owner of the property is more than a mere slip; indeed, for the reasons stated both by the learned magistrate and by myself, the misdescription was due to a mistake of law. The question whether the respondent stole money from the Association was not a matter which was in issue at any stage of the trial, and in consequence the respondent had no opportunity of presenting his defence to any such charge.

I am therefore not persuaded that the magistrate erred in failing to convict the respondent for the reasons advanced in the second and third grounds of the petition of appeal.

Finally, I am invited to hold that the learned magistrate erred in not exercising the discretion conferred upon him by s. 213(1) of the Criminal Procedure Code. I decline to do so. In the first place, it is clear that the necessity for considering an amendment did not arise until after the conclusion of the evidence and when the learned magistrate was considering the law prior to writing his judgment; secondly, had the magistrate been inclined to exercise his discretion to amend, then for the reasons I have endeavoured to express, any such amendment would have entailed a major reconstruction of the charge: it would have been necessary so to amend the charge as to formulate two counts of theft of different sums of money, stolen on different dates, the property of an organisation different from the person originally specified. I think it can hardly be suggested that the learned magistrate erred in neglecting to exercise his discretionary power to amend, when amendment entails reconstructions of such magnitude, particularly when that discretionary power may be exercised only in cases where it is clear that no injustice to an accused person will result. I decline to find that he did so.

For the reasons I have endeavoured to state I am not persuaded that the learned magistrate erred in his conclusions and the appeal is dismissed. I make no order as to costs.

I observe that the learned magistrate directed that the papers in the case be sent to the appropriate disciplinary authority for such action as might be thought fit in relation to the respondent's conduct throughout the transaction upon which the prosecution in the lower court was founded. I endorse that direction and also direct that a copy of my judgment be forwarded to the Attorney-General as Chairman of the Advocates Committee established under the provisions of the Advocates Ordinance, 1956.

Appeal dismissed.

For the appellant:

Director of Public Prosecutions, Uganda

A. G. Korde (State Attorney, Uganda)

For the respondent:

Wilkinson & Hunt, Kampala

P. J. Wilkinson Q.C. and S.H. Dalal

Division: Court of Appeal at Mombasa
Date of judgment: 14 January 1964
Case Number: 50/1963
Before: Sir Trevor Gould VP, Crawshaw and Newbold JJA
Sourced by: LawAfrica
Appeal from: The Supreme Court of Kenya – Pelly Murphy, J.

[1] Income tax – Additional tax – Default or omission by taxpayer – Death of tax payer before assessment made – Additional tax included in assessment upon personal representatives – Penalty – Liability of estate – East African Income Tax (Management) Act, 1952, ss. 40 and 56.

Editor's Summary

The Commissioner assessed the respondents as administrators of the estate of a deceased with tax and included therein a sum for additional tax chargeable under s. 40 of the East African Income Tax (Management) Act, 1952. It was not disputed that there had been a default or omission on the part of the deceased before his death rendering s. 40 applicable but it was submitted for the respondents that the additional tax chargeable under s. 40 amounted to a penalty, that at common law a penalty is not recoverable after the death of the person concerned and that the Act should be construed so as not to over-ride the common law unless that intention was to be plainly gathered. The respondents' appeal to the Local Committee was rejected whereupon they appealed to the Supreme Court which allowed the appeal and set aside the assessment to additional tax on the ground that it was a penalty and as such only recoverable by a suit instituted for its recovery. On further appeal by the Commissioner,

Held –

- (i) although the effect of s. 40 of the Act is to impose higher rates in cases of default and omission, the important consideration is that whilst the section is expressed in terms of amount, it is invariably an “amount of tax”; the additional tax is plainly tax within the meaning of the Act and s. 40, *ibid.*, enacts that the person concerned shall be chargeable with it;
- (ii) though the additional tax chargeable by s. 40, *ibid.*, had been designed as a penalty, there was no distinction in any part of the Act between the treatment accorded to this additional tax and any other tax;
- (iii) there is nothing in the Act which suggests that the “tax” which is charged under s. 56, *ibid.* by assessment does not, or ought not, to include all tax with which the deceased would have been chargeable or that some different basis of assessment should apply; the plain intention is to substitute the administrators for the deceased;
- (iv) whether or not additional tax under s. 40, *ibid.* is penal in nature, the legislation deals with it in all respects as tax and, whatever the position may have been prior to the Law Reform (Miscellaneous Provisions) Act, 1956, there could now be no reason for not following the normal rules of construction under which the additional tax is included in what may be assessed and collected from personal representatives as a debt.

Appeal allowed. Decree of the Supreme Court set aside and assessment confirmed.

Cases referred to in judgment:

- (1) *Chudleigh's Case*, 76 E.R. 270.
- (2) *A.-G. v. Beech*, [1898] 2 Q.B. 147.
- (3) *R. v. Salisbury (Bishop)*, [1901] 1 Q.B. 573.

- (4) *A.-G. v. Canter*, [1939] 1 K.B. 318; [1939] 1 All E.R. 13.
- (5) *Westwood v. Cann*, [1952] 2 Q.B. 887; [1952] 2 All E.R. 349.
- (6) *Sheik Fazel Illahi Sons' Trustee v. Income Tax Comr.*, [1961] E.A. 594 (C.A.).

The following judgments were read.

Judgment

Sir Trevor Gould VP: By an assessment dated September 30, 1958, the Commissioner of Income Tax (appellant in this court) assessed the respondents, as administrators of the estate of one Nazerali Merali, deceased, with tax in relation to the income of the deceased in the year 1952. Included in the assessment was the sum of Shs. 72,474/- being additional tax imposed under s. 40 of the East African Income Tax (Management) Act, 1952 (hereinafter referred to as “the 1952 Act”) and it is common ground, both that the question in issue in this appeal falls to be decided under the provisions of the 1952 Act and that the deceased himself in his lifetime would have been properly chargeable with the additional tax. He died, however, on April 28, 1957, before the assessment was made.

The respondents appealed to the Local Committee for the Mombasa area against the assessment to additional tax but the Local Committee confirmed the assessment. A further appeal was taken to the Supreme Court of Kenya at Mombasa and the learned judge allowed the appeal and set aside the assessment to additional tax on the ground that it was a penalty and as such not recoverable from the estate of the deceased taxpayer save by way of a suit instituted for its recovery. Against this decision the Commissioner now appeals.

Section 40 falls within part VII of the 1952 Act under the subheading “Rates of Tax”. Earlier parts contain provisions imposing a tax on income, providing how the total income is to be ascertained, and for various allowances which may be made in arriving at the chargeable income. Sections 36-39, which precede s. 40 in Part VII deal with the rate of tax to be charged upon the income of individuals and persons other than individuals resident or non-resident in the East African territories. Section 40 (omitting sub-ss. (5) and (7) as not being material) reads as follows:

“40(1) Any person who –

- (a) makes default in furnishing a return, or fails to give notice to the Commissioner as required by the provisions of section 59, in respect of any years of income shall be chargeable for such year of income with treble the amount of tax for which he liable for that year under the provisions of section 36 to 39 inclusive; or
- (b) omits from his return for any year of income any amount which should have been included therein shall be chargeable with an amount of tax equal to treble the difference between the tax as calculated in respect of the total income returned by him and the tax properly chargeable in respect of his total income as determined after including the amounts omitted

and shall be required to pay such amount of tax in addition to the tax properly chargeable in respect of his true total income.

- (2) If the Commissioner is satisfied that the default in rendering the return or any such omission was not due to any fraud, or gross or wilful neglect, he shall remit the whole of the said treble tax and in any other case may remit such part or all of the said treble tax as he may think fit.

- (3) The additional amounts of tax for which provision is made under this section shall be chargeable in cases where tax has been assessed by the Commissioner under the provisions of section 72 as well as in cases where such income or any part thereof is determined from returns furnished.
- (4) The powers conferred upon the Commissioner by this section shall be in addition to any right conferred upon him to commence proceedings in respect of an offence under part XIII.

.....

- (6) Any tax charged under the provisions of this section shall be deemed not to be part of any tax paid or payable for the purposes of sections 36, 37,38,39,41,45,46,48,90, and 91.”

Part VIII of the 1952 Act is headed “Persons Assessable” and deals with the questions of husband and wife, trustees, agents, and partnerships. Section 56, so far as material, reads:

- “56. Where any person dies and would but for his death have been chargeable to tax for any year of income in respect of his income up to the date of his death, assessments may be made at any time during the year in which he dies or within three years from the end of that year upon his executors or administrators and the tax charged shall be a debt due from and payable out of his estate.”

By. s. 71 (in Part X) the Commissioner is required to proceed to assess every person chargeable with tax as soon as may be after the expiration of the time allowed for delivering a return. Under s. 74 the Commissioner must send each person assessed a notice of assessment. Tax becomes payable under s. 82 in Part XII (subject to certain special provisions) within 40 days after service of a notice of assessment, or within nine months of the end of the year of income, whichever is the later. Then follow provisions for objections to assessments and appeals against assessment and finality is given by s. 79 which, so far as material, reads as follows:

- “79. Where no valid objection or appeal has been lodged within the time limited by this Part against an assessment as regards the amount of the income assessed thereby, or where the amount of the income has been agreed to under sub-section (4) of section 74, or where the amount of such income has been determined on objection or appeal, the assessment as made or agreed to or determined on appeal, as the case may be, shall be final and conclusive for all purposes of this Act as regards the amount of such income.”

If the tax is not paid within the prescribed period a demand note must be served, under s. 83, by which section also a penalty is added, and if payment is not made within 30 days of the demand the Commissioner may proceed to enforce payment. As at the material date that could be done either by suit (s. 86) or by distraint (s. 86A). The scheme of the 1952 Act is therefore comparatively simple. The assessment is a basic document without which no tax can become payable. It may be amended after objection or settled on appeal but finally becomes conclusive as to the amount of the income. Payment may then be enforced by suit or distraint.

In the present case the starting point is the agreed fact that there had been default or omission on the part of Nazerli Merali, before his death, rendering applicable the provisions of s. 40. That means that Nazerali Merali became chargeable with additional amounts of tax. Counsel for the Commissioner pointed out that s. 40 is in the part of the Act dealing with rates of tax and submitted that its effect was to impose higher rates in cases of default and omission. In one sense that is correct though the idea of a rate is easier to envisage in cases

falling under s. 40(1)(a) than 40(1)(b). However, I do not consider that very material, and the important consideration is that though the section is expressed in terms of amount it is invariably an “amount of tax”. That appears with the utmost clarity in the final part of sub-s. (1) in the phrase “and shall be required to pay such amount of tax in addition . . .”. There are further references to the amount as “tax” in subsections (2), (3) and (6). The definition of “tax” in s. 2 is: “‘tax’ means the income tax and surtax imposed by this Act”. I am unable to accept the argument of counsel for the respondents that “treble tax” is not income tax within the meaning attached to that term in the Act. Even though, as he submitted, it might exceed the total income, it is imposed in respect of a year of income and is directly related to and calculated upon the amount of the true income for that year. Though it may also in essence be a penalty it is dealt with entirely as tax.

The additional tax is in my opinion plainly tax within the meaning of the Act and s. 40 enacts that the person concerned shall be chargeable with it. “Chargeable”, in the context, can only mean in my opinion “liable to be charged”. The machinery provided for actually charging him is an assessment, which, under s. 71 is required in the case of every person “chargeable with tax”. When assessed the taxpayer is, I think, “charged”, though nothing is yet payable and he has his right to notice (together with ancillary rights of objection and appeal) before anything becomes payable. Only then is there a complete right of action in the Commissioner in the sense that the steps indicated are conditions precedent to his right to sue or otherwise proceed, and in the lifetime of Nazerali Merali those would have been the appropriate and necessary steps.

Nazerali Merali having died before any step was taken, the Commissioner relies upon s. 56 as conferring authority to include the additional tax in the assessments of the respondents as administrators of his estate. He was liable to be charged with tax (in an amount augmented by the operation of s. 40) for the relevant year of income; s. 56 enables an assessment to be made upon the administrators within a specified period. The wording indicates that the function of the assessment (as I have said earlier) is to charge the tax, for it states “. . . assessments may be made . . . and the tax charged shall be a debt . . .”. I can find no indication within the framework of the Act which suggests in any way that the “tax” which is charged under s. 56 by assessment does not, or ought not, to include all tax with which the deceased would have been chargeable under the preceding sections, or that some different basis of assessment should apply. The plain intention is to substitute the administrators of the estate for the deceased. In s. 40(6) ten sections are specified for the purposes of which tax charged under s. 40 is deemed not to be part of tax paid or payable; s. 56 is not referred to there as it might well have been had it been desired to eliminate tax chargeable under s. 40 from the purview of s. 56.

I find no ambiguity in the Act itself but it is argued for the respondents that the additional tax chargeable under s. 40 is a penalty, that at common law a penalty is not recoverable after the death of the person concerned, and that the Act should be construed so as not to over-ride the common law unless that intention is to be plainly gathered. Counsel referred to *Chudleigh’s Case* (1) (76 E.R., at p. 303); *A.-G. v. Beech* (2) ([1898] 2 Q.B., at p. 155) and *R. v. Bishop of Salisbury* (3). I do not at all query the principle of construction involved but quit fail to see its applicability in the case of a common law principle which has itself already been swept away (almost entirely) by legislation. The maxim “actio personalis moritur cum persona” was never one of universal application and has now, subject to a few specified exceptions been done away with by (in England) the Law Reform (Miscellaneous Provisions) Act, 1934, and in Kenya by an Ordinance under the same title in 1956 (now the Law Reform Ordinance, Cap. 26 of the Laws of Kenya). That penalties

generally and under income tax legislation in particular fall within the causes of action preserved by that legislation is plain from the cases of *A.-G. v. Canter* (4) and *Westwood v. Cann* (5) which applied the first mentioned decision in relation to penalties in respect of the statutory standard of fineness of gold. I do not overlook that the 1952 Act was passed before the Law Reform (Miscellaneous Provisions) Ordinance, 1956, but no decision applicable to the question of interpretation now in issue was quoted in argument, and I would not consider it right now to attempt to put a gloss on apparently plain words by reason of an extinct common law doctrine.

It is now necessary to look more closely at the decision in *A.-G. v. Canter* (4) (*supra*) upon which the learned judge in the Supreme Court rested his decision. In so doing he accepted that the additional tax in question in these proceedings was a penalty and as such was not recoverable from the estate of the deceased taxpayer save by way of a suit instituted for its recovery, and that the position under the Kenya law was the same as that in England at the time when *Canter's* case (4) was decided.

As to the first point I would agree that the additional tax made chargeable by s. 40 of the 1952 Act is a penalty in essence in that it must have been designed by the legislature to perform the function of a penalty; nevertheless the legislature thought fit to accomplish its object by imposing additional tax and so far as I am aware there is no distinction whatever in any part of the Act between the treatment accorded to this additional tax and any other tax. I will, however, for the purpose of this discussion of *Canter's* case (4) assume that it is a penalty.

The facts in that case were that a testator during his lifetime forfeited and became liable to pay substantial sums under s. 30(1)(b) of the Income Tax Act, 1918, which section (as amended by the Finance Act, 1920) reads:

“A person who in making a claim for or obtaining any allowance or deduction . . . (a) is guilty of any fraud or contrivance; or (b) fraudulently conceals or untruly declares any income or any sum which he has charged against or deducted from, or was entitled to charge against or to deduct from another person; or (c) fraudulently makes a second claim for the same cause, shall forfeit the sum of 20 l, and treble the tax chargeable in respect of all the sources of his income and as if such claim had not been allowed”.

After the death of the testator by order of the Commissioners of Inland Revenue proceedings were brought against the executors in the name of the Attorney-General under s. 221 of the 1918 Act for recovery of the amount forfeited.

The Court of Appeal made two findings. First that the proceedings to recover a penalty under the Income Tax Acts were not proceedings in respect of a cause of action in tort. Secondly, that the liability to pay the sums in question in the proceedings gave rise to a cause of action which was by s. 1(1) of the Law Reform (Miscellaneous Provisions) Act, 1934, made to survive as against the estate of the testator. So far as these findings go there is nothing in them to help the respondent in the present case – rather the reverse. Counsel relied, however, upon dicta in the judgment of the Court of Appeal as showing that, even after the passing of the Law Reform (Miscellaneous Provisions) Act, 1934, a penalty could only be recovered by action and this submission was accepted by the learned trial judge. I will first take counsel's reference to the two sentences preceding the final sentence of the judgment, which he relied upon in support of the proposition that the Master of the Rolls was saying that a penalty could be recovered by action but not by assessment. The two sentences

relied upon can only be properly understood in the context of the passage in which they occur ([1939] 1 K. B., at pp. 333-334) which reads:

“In conclusion, we must refer to a familiar principle of construction upon which the appellant strongly relies. It is stated by the Earl of Selborne, L.C. in *Seward v. Vera Cruz*, 10 App. Cas. at p. 68 in the following words: ‘Now if anything be certain it is this, that where there are general words in a later Act capable of reasonable and sensible application without extending them to subjects specially dealt with by earlier legislation, you are not to hold that earlier and special legislation indirectly repealed, altered or derogated from merely by force of such general words, without any indication of a particular intention to do so’. It is said that income tax penalties are subjects specially dealt with by earlier legislation – to wit, the Income Tax Acts – and that the words ‘all causes of action’ are mere general words within the meaning of the principles so enunciated. In our opinion, this principle does not assist the appellant. There is no question here of repealing, altering or derogating from the principles of the Income Tax Acts with regard to penalties. If we rightly construe the Act of 1934, all that it does is to provide that, where a cause of action in respect of a penalty existed at the death, it is to survive against the estate. The provisions of the Income Tax Acts with regard to penalties are left entirely unaffected. In our opinion, the decision of Lawrence, J. was right, and the appeal must be dismissed.”

All that the Court of Appeal did there was to consider and reject an argument that the general words of the Law Reform (Miscellaneous Provisions) Act, 1934, indirectly repealed, altered or derogated from the provisions of the Income Tax Acts as to penalties. The court said that those provisions remain unaffected though a cause of action to recover such penalties would survive the death of the recovery of penalties and I fail to see that the words relied upon have any significance in relation to the question now in issue.

There is, however, another passage, earlier in the judgment, which merits more serious consideration. It reads (*ibid.*, at p. 332):

“But there are two features of the scheme of penalties which must be mentioned. One is that in some cases (including the present) the Crown has an option to proceed either before the General Commissioners or by action or information: see s. 107 and s. 221(5). Where such an option exists, the only limb of it, which (if the Crown be right) survives under the Act of 1934, will be the latter. There is no machinery for getting legal personal representatives before the General Commissioners for this purpose.”

The schemes of the English and East African legislation are divergent in many respects and the passage quoted indicates one of the differences. In East Africa there is no such option in relation to additional tax, which is treated, as I have observed, in exactly the same way as any other tax. At first sight the passage last quoted seems a little obscure in that, if a cause of action for a penalty exists and is to survive by virtue of the Law Reform (Miscellaneous Provisions) Act, the question through what tribunal the cause of action was to be enforced would hardly seem to be material. No case decided between the date of *Canter's* case (4) and the passing of the Finance Act, 1960, which, by s. 56(5) provided for the initiation or continuance of all forms of proceedings for penalties after the death of the taxpayer, was quoted in argument. That is possibly because in the interim the Crown would naturally resort to the form of proceedings concerning which there could be no dispute. It may be of interest to note that in Professor Wheatcroft's book on the Law of Income Tax, Surtax and Profits Tax (1962 Edn.), at pp. 1693-1694, there is the following note on s. 56(5):

“This provision altered the law in Scotland where there was formerly no obligation on personal representatives to discharge penalties due from the deceased. In England and Wales such an obligation was imposed by the Law Reform (Miscellaneous Provisions) Act, 1934, s. 1: *A.-G. v. Canter* (4).”

To return to the passage from *Canter's* case last quoted I think that the reference to the absence of machinery for getting personal representatives before the Commissioners is obviously the basis of the opinion expressed. Sub-s. (5) of s. 221 of the 1918 Act (applicable also to s. 107) which provides for the procedure before the General Commissioners, contains this passage:

“... and upon a summons to the person accused to appear before them at such time and place as they shall fix, and they shall examine into the matter of fact, and hear and determine the same in a summary way ...”

I think that it was the requirement that the Commissioners must have the “person accused” before them before they could assess a penalty, which led to the observations of the Court of Appeal. The 1918 Act clearly distinguishes between penalties and tax, and if under s. 221(5) the Commissioners were unable to proceed to the assessment of a penalty, provisions such as s. 223 which provides for the collection of an increased rate of tax imposed as a penalty, could not become operative. In my opinion the passage quoted is not to be taken as laying down that a method of enforcement of a cause of action by assessment is intrinsically unacceptable in the case of a penalty but merely as saying that the stage of assessment could not be reached before the General Commissioners with the machinery provided.

I find no such impediment in the East African legislation with its completely different approach. With respect to the learned judge in the Supreme Court it was a fallacy to say, as he did, that the additional tax was not recoverable “save by way of suit instituted for its recovery”, for no such suit could succeed until there had been an assessment. I have already pointed out that there is a mandatory duty upon the Commissioner under the 1952 Act to assess every person chargeable with tax. Tax for that purpose must include additional tax under s. 40 as otherwise that additional tax would never become payable. Tax only becomes payable within 40 days after notice of assessment or within nine months of the end of the year of income, whichever is later. If the Commissioner failed in his duty to assess it would therefore never become payable, and assessment is therefore a condition precedent to suit.

In those circumstances it is clear that additional tax after the death of the taxpayer must be collectable through the normal machinery of assessment, followed if necessary by suit or distraint, or it is not collectable at all. It is common ground that it can (and must) be included in the assessment during the lifetime of the taxpayer. Section 56 provides both the machinery and authority for including it in the assessment within a limited period after his death. There is no provision that at any stage the “person accused” must be summoned before the additional tax can be imposed. I find in *Canter's* case (4) no authority for saying that the machinery for assessment is objectionable as such. If when additional tax under s. 40 becomes “chargeable” there is a cause of action in the Commissioner, subject to a condition precedent that there shall be an assessment, there is no reason to say that the cause of action does not survive under the Law Reform (Miscellaneous Provisions) Ordinance, 1956. If the matter should be looked at as one in which no complete cause of action arises until assessment, there is authority to assess the personal representatives and the tax charged becomes a debt due by the estate.

In the final result in my judgment, whether or not additional tax under s. 40 is penal in nature, the legislation deals with it in all respects as tax, and

whatever the position may have been prior to the Law Reform (Miscellaneous Provisions) Act, 1956, there can now be no reason for not following the normal rules of construction, under which the additional tax is included in what may be assessed and collected from personal representatives as a debt.

For these reasons I would allow the appeal, set aside the judgment and decree in the Supreme Court, and affirm the assessment in question. I would allow the Commissioner his costs in this court and the Supreme Court.

Crawshaw JA: In *Sheikh Fazel Ilahi Sons' Trustees v. Income Tax Comr.* (6) I expressed the view, for the reasons which I gave, that penalties under s. 40(1) of the East African Income Tax (Management) Act, 1952, were fixed statutory penalties from which in certain circumstances the Commissioner of Income Tax must, and anyway might in his administrative discretion, grant relief, and were not part of "an assessment" for the purposes of s. 78(1) which provides for appeals by persons "being aggrieved by an assessment made upon him". The other members of the court took a different view, although it was not there necessary to give a decision on the matter.

I am still doubtful whether such penalties are "assessed" within the meaning of part X or s. 56 of the Act, but for the purposes of collecting the penalties I do not think that it matters. Provisions for the collection of "tax" are made under part XII of the Act, and in s. 40 the penalties are referred to as "additional tax". Section 56 provides for "assessments" being made after the taxpayer dies on "his income up to the date of his death". The view taken by my brother judges in the instant case respecting the relationship of assessments to penalties under s. 40 follows the views of the other members of this court in the *Sheik Fazel* case and earlier cases, and although the matter appears to have been fully argued for the first time in the instant case, I feel that in the circumstances I should defer to the opinion of the majority. This means that s. 56 is applicable and the appeal should succeed.

Newbold JA: I agree with the judgment of the learned Vice-President and with the order proposed by him.

Appeal allowed. Decree of the Supreme Court set aside and assessment confirmed.

For the appellant:

The Legal Secretary, E.A. Common Services Organization

P.J. Treadwell (Asst. Legal Secretary E.A. Common Services Organization)

For the respondents:

Atkinson, Cleasby & Co., Mombasa

R. P. Cleasby

Peter Okoth and another v R
[1964] 1 EA 103 (CAN)

Division: Court of Appeal at Nairobi

Date of judgment: 23 March 1964

Case Number: 168/1963

Before: Sir Samuel Quashie-Idun P, Crawshaw and Crabbe JJA
Sourced by: LawAfrica
Appeal from: Supreme Court of Kenya – Trevelyan, J.

[1] Criminal law – Murder – Malice aforethought – Deceased beaten whilst in custody – Beating followed by vomiting – Death due to asphyxia – No evidence that beating constituted grievous harm – Misdirection as to application of Penal Code, s. 207 (k).

Editor's Summary

The appellants, tribal policemen, arrested the deceased and others as persons suspected of being thieves. The prisoners were taken to a camp and next day were brought before three sub-chiefs who heard their case. Three of the prisoners were then released and the deceased and another prisoner were held in custody to be brought before an African court the following week. Whilst in custody overnight the appellants beat the deceased with a rungu and a whip for about an hour in order to extract information from him. The next night the man died and the police were informed. A post mortem examination was held which established that the cause of death was asphyxia due to vomit entering the respiratory tracts whilst the deceased was unconscious. The doctor's evidence was that the vomiting and unconsciousness would have resulted from the beating and the bruising respectively. At the trial of the appellants the judge directed himself that the appellants were jointly engaged in the unlawful purpose of beating a prisoner for information, that as a direct consequence of that unlawful purpose the deceased died and that malice aforethought had been proved. On appeal against their conviction,

Held –

- (i) there was no sufficient evidence to warrant the judge's conclusion that there was malice aforethought within the meaning of s. 207 of the Penal Code;
- (ii) the doctor gave no evidence that the deceased had sustained grievous harm nor that grievous harm would be necessary to cause the vomiting and the nature of the injuries suggested that the appellants might, within their knowledge, have avoided causing serious harm; the judge might from the notes of his summing up have thought that proof of grievous harm was not a necessary ingredient in the circumstances;
- (iii) accordingly it was unsafe to allow the conviction of murder to stand.

Appeal allowed. Conviction of murder set aside and conviction of manslaughter substituted.

Cases referred to in judgment:

- (1) *Director of Public Prosecutions v. Smith*, [1960] 3 All E.R. 161.

Judgment

Sir Samuel Quashie-Idun P: The appellants were convicted of murder by the Supreme Court of Kenya (Trevelyan, J. sitting at Kisii) on December 3, 1963, and sentenced to death. In brief the facts of the case against the appellants before the trial court were as follows.

Early on Friday, March 29, 1963, the first appellant and the second prosecution witness Opondo, who are tribal policemen, arrested the deceased and other persons suspected of being thieves. The deceased, who was in good health, and had

no injuries on his body, was taken together with the other prisoners to a camp. At the time of the arrest the second appellant, also a tribal policeman, was not present, but he arrived at the camp at 5 p.m. on the day of the arrest. The deceased and the other prisoners remained in the camp until the next day when their case was heard by three sub-chiefs. After the trial, three of the prisoners were released, leaving the deceased and another prisoner who were to be taken to the Rongo African Court on Monday, April 1. The deceased and the other prisoner remained in custody at the camp on Saturday, March 30 and Sunday, March 31. On Saturday, March 30, at about 8 p.m. the P.W.2, the first and second appellants and others went into the hut of the first appellant who was also present. The party in the first appellant's hut were drinking until the P.W.2 left to go to sleep at 11 p.m. According to the evidence, the second appellant came and called him at 1.15 a.m. on March 31 and asked the witness to go and take a statement from the accused. The witness refused to do so. Shortly afterwards, the first appellant, who is a corporal, called the witness to go and take a statement from the deceased. The witness accompanied the first appellant to appellant's house. Witness met the deceased screaming and handcuffed to the other prisoner Odwar. The second appellant was also present. In the presence of the two appellants, the P.W. 2 asked the deceased why he was screaming. The deceased replied that the first and second appellants and another person had beaten him and had forced him to disclose the name of the person with whom he had stolen. The first appellant at this time ordered the witness to take down a statement from the deceased. The witness refused to do so as the deceased was being beaten. The first and second appellants continued to beat the deceased, the first appellant using a rungu while the second appellant used a whip. The first appellant who was wearing boots kicked the deceased twice. An attempt by the witness to stop the appellants continuing to beat the deceased resulted in a threat to beat the witness as well. In the end, the witness succeeded in pushing the first appellant out of the room. The second appellant also came out of the room. The witness returned into the room where the deceased was and bolted the door. The appellants knocked at the door and asked that it should be opened. One Gabriel who was in the room opened the door and the two appellants entered the room. The second appellant pushed the witness and the first appellant threatened to cause the witness's transfer from the tribal police post as he said the witness had not known how to handle thieves. The witness remained in the hut till 5 a.m. during which period the appellants had beaten up the deceased for about one hour. According to the witness the appellants were sober at the time they were beating the deceased. On the morning of March 31, P.W.2 went back to the first appellant's house and saw the deceased still handcuffed. The deceased was looking tired, and complained of pains in the chest. The witness removed the handcuffs. The deceased slept in the witness's house in the police post on the night of Sunday, March 31. The deceased said he was very sick. On the next morning the witness found the deceased dead. The witness made a report to the appellants who in turn made a report to the police. The deceased's body was removed by the police and a post mortem examination was held by P.W.7, Doctor Umaria, who gave evidence with which I shall deal later. Statements made by the appellants to the police after they had been charged with the murder of the deceased and cautioned were admitted in evidence at the trial. At the trial, the appellants did not give evidence or make any statements. Each of them relied on the statement he had made to the police. The three assessors returned a verdict of murder against each of the appellants.

In his judgment the learned trial judge found the appellants guilty of murder. The appellants have appealed against their convictions and with the leave of the court their counsel was allowed to argue on their behalf an additional ground namely:

“The learned trial judge did not address his mind sufficiently on the question of intoxication and therefore came to an erroneous verdict.”

Before arguing the additional ground, learned counsel submitted on behalf of the second defendant that the defence of alibi raised by the second appellant at the trial was not adequately considered by the learned trial judge. It was submitted that the second appellant had said in his statement to the police that he was not present when the deceased was arrested as he had left for Kuja on March 28. He returned to Angaga Tribal Police Post on March 31 and found the deceased and another prisoner at the post. The prisoners were in charge of P.W.2 and the second appellant noticed a wound on the leg of the deceased. The deceased said he had been injured by a bicycle while he was being arrested, but that P.W.2 said that the deceased had been injured by other thieves in the night. The appellant further said in his statement that on the following morning, March 31, 1963, he heard that the prisoner (the deceased) had died at the house of P.W.2.

It was submitted on behalf of the second appellant that when the second appellant mentioned March 31 for the second time he meant April 1 and that if the learned trial judge had properly directed his mind and those of the assessors to the fact that the second appellant did not return to the police post until March 31 and that it was April 1 that he said that he heard of the death of the deceased, the trial judge would have accepted the second appellant's defence that he was not present on March 31 when it was alleged he took part in the assault.

It is clear on the record that the learned trial judge went through the statement of the second appellant with the assessors and dealt with the defence of alibi set up by the second appellant both in the summing up and in his judgment. It is our view that the learned trial judge properly rejected the defence of alibi which was not proved and which could not destroy the overwhelming evidence given by the witnesses for the prosecution, who the judge believed, that the second appellant was present and that he took part in the assault on the deceased.

In respect of the additional ground argued we note that neither of the appellants relied on intoxication as a defence. In fact, there was evidence that although the appellants had been drinking, they were not drunk. The learned trial judge, however, directed the assessors and himself on that question and told the assessors that if they had any doubt as to whether the appellants were drunk or not they should find the appellants guilty of manslaughter.

It is our view that as there was no evidence that the appellants were drunk at the time they were alleged to have assaulted the deceased, the defence of intoxication was not available to them although, in spite of this the learned trial judge adequately directed the assessors in that respect in favour of the appellants. Notwithstanding that the grounds of appeal argued failed, the court was in doubt as to whether there was malice aforethought within the meaning of s. 207 of the Penal Code.

This brings us to the evidence of the doctor who performed the post mortem examination. According to him, the deceased was about 35 years of age. There were multiple bruises on the arms, face, back of trunk, buttocks and both legs. The total number of bruises was about 65, mostly elongated from about 1/4 inch to 1 1/2 inches; the width was less than 1/4 inch. Although the lungs were considerably inflated, he said all the organs were normal. He gave the cause of death as being asphyxia. He went on and stated as follows:

“In my opinion the multiple bruises could have caused the death. It is not usual for vomit to enter due to bruising. In this case the multiplicity of the bruises caused the severe pain which in turn caused uneasiness in the

stomach and might have caused the vomiting when he was unconscious. The bruising would cause unconsciousness and vomiting would take place during unconsciousness. The bruising was the direct cause of all that subsequently occurred, including the death.”

In his judgment the learned trial judge stated as follows:

“I accept the doctor’s evidence as to time of death and the instrument used though, in addition, I accept the eye witnesses’ account of the use of the whip, the gumboots and the rungu: the bruising was caused by their conjoint use as the witnesses say . . . There is, here, a clear case of murder. The two accused . . . were jointly engaged in the unlawful purpose of beating a prisoner for information. As a direct consequence of that unlawful purpose, the deceased died . . . Malice aforethought has been proved well beyond any reasonable doubt.”

As to whether there was satisfactory proof that the intention of the appellants was to cause death or to cause grievous bodily harm, we are of the opinion from the evidence and from the nature of the bruises described by the doctor, that there was no sufficient evidence to warrant the trial court coming to the conclusion that there was malice aforethought within the meaning of para. (a) of s. 207 of the Penal Code. The learned trial judge stated in his judgment that the appellants were jointly engaged in the unlawful purpose of beating a prisoner for information, but this does not of course come within para. (c) of s. 207 of the Penal Code which reads:

“207. Malice aforethought shall be deemed to be established by evidence proving any one or more of the following circumstances –

- (a) an intention to cause the death of or to do grievous harm to any person, whether such person is the person actually killed or not;
- (b) knowledge that the act or omission causing death will probably cause the death of or grievous harm to some person, whether such person is the person actually killed or not, although such knowledge is accompanied by indifference whether death or grievous bodily harm is caused or not, or by a wish that it may not be caused;
- (c) an intent to commit a felony;
- (d) an intention by the act or omission to facilitate the flight or escape from custody of any person who has committed or attempted to commit a felony.”

As to para. (b) of the section it is to be observed that the doctor gave no evidence of the deceased having sustained grievous harm, nor that grievous harm would be necessary to have caused the vomiting. The nature of the injuries, in fact, suggested that the appellants might, within their knowledge, deliberately have avoided causing serious harm. The notes on summing up show that the learned judge addressed the assessors on malice aforethought, but the following extract from his judgment leaves us in some doubt whether he may not have misdirected himself and the assessors on the applicability of para. (c) of the section, and may have thought that proof of grievous harm was not a necessary ingredient in the circumstances. The extract reads:

“They were jointly engaged in the unlawful purpose of beating a prisoner for information. As a direct consequence of that unlawful purpose the deceased died – but for it, he would not have died.”

Further there is the final cause of death, asphyxia. The learned judge does not say that the appellants as reasonable men should have contemplated such a probable result of their actions (*Director of Public Prosecutions v. Smith* (1)),

and from the medical evidence it was not a probable result. The doctor's view was that asphyxia was due to vomit entering the respiratory tracts whilst the deceased was unconscious and that the unconsciousness would have resulted from the bruising. Death occurred the next night after the beating and the doctor does not appear to have been asked whether the unconsciousness could have been of the nature of normal sleep. He did, however, express the view that the vomiting was the result of the beating and the learned judge appears to have accepted that. For the reasons we have given we thought it unsafe to allow the conviction to stand.

On March 10 we allowed the appeal of the appellants, set aside the verdict of murder and substituted therefor a verdict of manslaughter and the above is our reason for doing so. The appellants are sentenced to ten years' imprisonment each.

Appeal allowed. Conviction of murder set aside and conviction of manslaughter substituted.

For the appellants:

Bali Shaima & Co., Nairobi

Bali Sharma

For the respondent:

The Attorney-General, Kenya

A. I. E. Omolo (Crown Counsel, Kenya)

Nzige Juma v Republic [1964] 1 EA 107 (HCT)

Division:	High Court of Tanganyika at Dar-es-Salaam
Date of judgment:	24 December 1963
Case Number:	777/1963
Before:	Biron J
Sourced by:	LawAfrica

[1] Criminal law – Arrest on suspicion – No warrant – Assault on policeman in execution of duty – Accused suspected of being in possession of stolen property – Assault by accused when detained for search – No reason given for detention – No opportunity for police to give reason for search – Accused aware of reason – Whether policeman's conduct unlawful because of omission so to inform accused.

Editor's Summary

The appellant was convicted of assaulting a police officer in the due execution of his duty. The evidence was that a police sergeant suspected the appellant of having in his possession or conveying medicine or

drugs stolen or unlawfully obtained, and that when he tried to detain and search the accused under s. 24 of the Criminal Procedure Code the appellant assaulted him. The appellant was not given any reason for his detention and search but the appellant's evidence showed that he knew the reason. On appeal the questions in issue were whether the police officer was in fact acting in execution of his duty and whether the detention and intended search of the appellant were in the circumstances lawful.

Held –

- (i) that the appellant knew why he was being detained and searched, and that the police officer was not given an opportunity of explaining to the appellant his reason for wanting to search him, were both circumstances which constituted exceptions to the general rule that a person who is arrested or detained must be informed of the reason for such arrest or detention;
- (ii) the omission or failure of the police officer to inform the appellant why he was being detained and searched did not render his conduct unlawful as the appellant knew the reason for his search and the police officer was not given

- any opportunity of explaining to the appellant his reason to search him;
- (iii) as the police officer's conduct was lawful, the appellant was properly convicted.

Appeal dismissed; sentence reduced.

Cases referred to in judgment:

- (1) *R. v. Msengi Abdullah* (1952), 1 T.L.R. (R) 107.
- (2) *Christie v. Leachinsky*, [1947] 1 All E.R. 567.

Judgment

Biron J: The appellant was convicted of assaulting a police officer in the due execution of his duty and he was sentenced to imprisonment for nine months. He is now appealing.

The alleged assault took place in a pombe shop, where the complainant, a detective sergeant, stated he was on special duty together with other officers. In describing the assault the complainant testified, and it is necessary to set out the relevant passage verbatim:

“As a result of powers conferred upon me under s. 24 of the C.P.C. I stopped one male African adult whom I suspected to be in possession of some medicine or drugs. This is the man whom I stopped. He is the accused [witness points at and identifies the accused in court]. I stopped him and told him I wanted to search him. At the time Goodhouse [a fellow detective sergeant] was about 15 paces away from me and Barnabas [a constable] was about 25 paces away from me. When I told him I wanted to search him he bent down, caught me by my right thigh, bent and twisted me and I fell down.”

His fellow officers came to his assistance and as they drew near, the appellant ran away. The appellant, who elected to give evidence on oath, stated that he saw the three police officers drinking near him. He recounted an exchange of remarks between them, as a result of which they threatened him that “if he was not careful he would find himself inside prison.” He then left the pombe shop. Apparently on the road, – and I quote:

“After a while I saw Sgt. Rashidi crossing a ditch, coming towards me in a hurry. He tried to jump but fell short. He went in the ditch.”

His evidence continued that he did not know what happened to Sgt. Rashidi (the complainant) but subsequently he was arrested and informed that he had assaulted the complainant, which allegation he denied. The learned magistrate who saw and heard the complainant and the appellant, accepted the evidence of the former, supported as it was by that of his companions, and rejected the appellant's evidence. He was certainly entitled so to do and his finding on the facts that the complainant was assaulted by the appellant is supported and justified by the evidence.

In accepting the prosecution evidence as he did, the learned magistrate stated in his judgment:

“From all the evidence before me I am convinced the accused did assault Sgt. Rashidi while he was executing his duty. I find the prosecution proved the case beyond reasonable doubts.”

This is the sole reference in the judgment to the aspect in respect of the complainant acting in the execution of his duty. The learned magistrate has failed to consider whether the complainant was in fact acting in execution of his duty, that his detention and intended search of the appellant were in the

circumstances

lawful. Unless his conduct was lawful, such detention and search would constitute wrongful imprisonment and an assault, which the appellant would be entitled to resist even to the extent of using violence. The learned magistrate has merely accepted the complainant's statement that he was acting in pursuance of the powers conferred by s. 24 of the Criminal Procedure Code, without any enquiry or examination into the lawfulness of his conduct. Section 24 of the Criminal Procedure Code, which reads:

"Any police officer may stop, search and detain any vessel, boat, aircraft or vehicle in or upon which there shall be reason to suspect that anything stolen or unlawfully obtained may be found and also any person who may be reasonably suspected of having in his possession or conveying in any manner anything stolen or unlawfully obtained",

has been considered and ruled on in connection with the offence under s. 312 of the Penal Code, the relevant part of which reads:

"Any person who has been detained as the result of the exercise of the powers conferred by section 24 of the Criminal Procedure Code and is brought before a court charged with having in his possession or conveying in any manner anything which may be reasonably suspected of having been stolen or unlawfully obtained . . ."

The leading case on s. 312 of the Penal Code, decided by a full bench, is that of *R. v. Msengi Abdullah* (1). In that case it was held that once an accused is before the court having been found in possession of suspect property as a result of his having been detained and searched under the powers conferred by s. 24 of the Criminal Procedure Code, the propriety of the detention and search cannot be questioned, that it is not relevant to the main charge of being in possession or conveying which may reasonably be suspected of having been stolen or unlawfully obtained, etc. However, in the judgment it is made perfectly clear that the propriety of the detention and search is relevant and can be questioned where an issue of assault or trespass is concerned. Thus, it is stated, inter alia ((1952), 1 T.L.R., at p. 114):

"It is not necessary for evidence to be given showing the grounds upon which the police officer relied to justify the search, if in fact the search justified placing the accused before the court."

and

"The information in the hands of the police and upon which the police acted is not material to giving the court jurisdiction if the accused is otherwise properly before the court, *but such information may be material in a civil action for trespass if the police are charged with not having reasonable suspicions upon which to found the search and the search was unsuccessful*";

and again (ibid., at p. 112):

"*The reason why the police officer suspected the accused is relevant to whether the accused was legally stopped and searched but it is not relevant to the charge itself once he has been brought before the court in exercise of the powers vested in the police by s. 24 of the Criminal Procedure Code. Evidence of why the police stopped and searched the accused may be inadmissible in law, and even if admissible extremely prejudicial to the accused . . . As stated, while such evidence is not relevant in a criminal charge, if the facts justify placing the accused before a court, yet it may be relevant and admissible in a civil action based on trespass, it being alleged that the police acted without reasonable grounds.*"

It would likewise be relevant in a case where a suspect, as in this instant case, the accused, resisted the detention and search and is subsequently charged with assault. The complainant in his evidence stated, as quoted, that he suspected the appellant of being in possession “of some medicines or drugs”. There is, however, nothing in his evidence or that of his fellow officers, to indicate that he informed the appellant of the reason for his detaining and wanting to search him, which, to my mind, is essential. The authority for this proposition is the judgment of the House of Lords in the case of *Christie v. Leachinsky* (2), quoted with approval in *R. v. Msengi Abdullah* (1). In his judgment Viscount Simon stated ([1947] 1 All E.R., at p. 572):

“These citations, and others which are referred to by Lord Du Parcq, seem to me to establish the following propositions: i. If a policeman arrests without warrant on reasonable suspicion of felony, or of other crime of a sort which does not require a warrant, he must in ordinary circumstances inform the person arrested of the true ground of arrest. He is not entitled to keep the reason to himself or to give a reason which is not the true reason. In other words, a citizen is entitled to know on what charge or on suspicion of what crime he is seized. 2. If the citizen is not so informed, but is nevertheless seized, the policeman, apart from certain exceptions is liable for false imprisonment.”

As noted, there is nothing in the record of the proceedings to indicate that the appellant was given any reason for his detention and why he was to be searched. However, it would appear from the evidence of the appellant himself that he was aware of such reason, in that he stated:

“At 5 p.m. I arrived at the pombe shop at Mwanga. I had my friend Hamishi with me. We started to drink pombe. Afterwards I saw three detective constables. They were just drinking beside us. Rashidi asked me if I was still selling hospital medicines. I replied he could arrest me if he saw me with medicine. Rashidi said if I was not careful I would be inside prison . . .”

It is thus clear that the appellant knew the reason for his being detained and why he was to be searched. From the passage in the evidence of the complainant above set out, it is likewise clear, that according to the complainant he was not given any opportunity of explaining to the appellant why he wanted to search him. That both such circumstances constitute exceptions to the general rule that a person being arrested or detained must be informed of the reason for such arrest or detention, is expressly provided for in Viscount Simon’s judgment (*ibid.*, at p. 573):

“3. The requirement that the person arrested should be informed of the reason why he is seized naturally does not exist if the circumstances are such that he must know the general nature of the alleged offence for which he is detained. 4. . . . 5. The person arrested cannot complain that he has not been supplied with the above information as and when he should be, if he himself produces the situation which makes it practically impossible to inform him, e.g. by immediate counter-attack or by running away.”

Whichever version is accepted, whether that of the complainant or that of the appellant, – incidentally they are not mutually exclusive but both may well be true, the omission or failure of the complainant to inform the appellant why he was detaining him and wanting to search him, would not render his conduct unlawful. Therefore, as such conduct was in fact lawful, the appellant was properly convicted of assaulting the sergeant in the due execution of his duty.

Even so, the sentence was unduly severe. In sentencing the appellant, the learned magistrate stated:

“This is a serious offence. The accused seems to be a hardened criminal, and he has assaulted a police officer who was merely doing his duty. The court takes a serious view of this offence.”

With respect, I fail to see any justification for the description of the appellant as a hardened criminal. No previous conviction was proved against, or admitted by, him. The record merely states: “Prosecution: Nothing relevant”. Nor was the assault of a particularly aggravated nature. Further, the medical assistant who examined both the complainant and the appellant, stated that he found bruises on the latter and that he was drunk, which could account for his conduct. The appellant has been in custody since September 12. I consider that to be sufficient punishment in the circumstances and reduce the sentence to such time as will result in the immediate discharge of the appellant.

Appeal dismissed; sentence reduced.

The appellant did not appear and was not represented.

For the respondent:

Director of Public Prosecutions, Tanganyika

E. O. Effiwatt (State Attorney, Tanganyika)

Lelawan Leseroi v R **[1964] 1 EA 111 (SCK)**

Division:	Supreme Court of Kenya at Nairobi
Date of judgment:	18 September 1963
Case Number:	866 and 867/1963
Before:	Sir John Ainley CJ and Wicks J
Sourced by:	LawAfrica

[1] Criminal law – Trial – Deaf mute – Conflicting evidence whether accused a deaf mute – Trial conducted without inquiry whether accused understood proceedings – Procedure to be adopted.

Editor’s Summary

On appeal against his conviction with another person for stealing cattle the record showed that when first the appellant appeared in court to answer the charge, the magistrate recorded that he said “It is not true”. At the trial a week later the magistrate recorded before any witnesses were heard that the appellant was unable to hear or speak though he was said to be quite fluent when questioned at a police post. Thereafter prosecution witnesses were called and the appellant though given the opportunity did not cross-examine them and the magistrate recorded that the appellant “still adopted the attitude that he is an idiot and unable to speak”. Three prosecution witnesses testified to the appellant’s ability to speak and at an adjourned hearing the police officer in charge of the police post where the appellant was detained, gave

evidence that the appellant could hear and speak reasonably well, but the chief of the appellant's manyatta testified that the appellant was unable to speak and said "We speak to him by hand signs and he replies in the same way". The prosecution then closed its case and thought the appellant's co-accused was then given an opportunity to make his defence the appellant was not asked any questions. In his judgment the magistrate made no precise finding whether the appellant was feigning throughout the trial but he found that though the appellant was apparently dumb he was well aware of what went on around him and was able to understand what was required of him. On appeal,

Held –

- (i) at the outset when faced with the possibilities that the appellant could not hear even if he could talk or that he could neither hear nor talk, the magistrate should have made full enquiry;

- (ii) if an accused stands before the court dumb and apparently without comprehension, the court before proceeding with the trial should consider whether there is reason to believe that the accused is of unsound mind;
- (iii) if the magistrate on hearing a witness like the chief, finds that intelligence can be conveyed to, and received from, the accused by means of signs, there is no reason, if the communication is adequate, why the accused should not be tried through the medium of sign language;
- (iv) taking into account the nature of the charge and the evidence likely to be adduced, the means of communication available must be adequate to ensure that the accused will have a full and proper understanding of the allegations made against him, and what prosecution witnesses are saying about him;
- (v) if communication adequate for the purposes of the case cannot be established the court should make a finding under s. 167 of the Criminal Procedure Code to the effect that the accused, though not insane, cannot be made to understand the proceedings and then proceed in accordance with s. 167(1)(a), *ibid.*;
- (vi) in the present case the court could not decide whether the conviction was justified, or whether the appellant was or was not capable of following the evidence or of understanding his rights.

Appeal allowed. Order for re-trial before another magistrate with direction that an inquiry be conducted at the outset whether the appellant can understand the nature of the proceedings.

Judgment

Sir John Ainley CJ, read the following judgment of the court: In this case we deal with the second appellant's case only. The appellant was convicted of stealing cattle and certainly there was very strong evidence that he was guilty of that offence. The difficulty however is this, that judging from the record there exists the possibility, we put the matter no higher than that, that he may be a deaf mute.

We find the record somewhat confusing. The appellant appeared before the magistrate upon May 29, 1963. It is recorded that the charge was explained to him and that he said "It is not true". If indeed the appellant said that, then there would have been an end of the matter. But the magistrate in his judgment makes no reference to this. Perhaps the appellant made some sign of negation and did not speak – we do not know.

However the case was adjourned for trial to June 7, and before any witnesses were heard the magistrate recorded:

"Accused No.2, Lelawan Leseroi [the appellant], is unable to hear or speak, though he was said to be quite fluent when questioned at Bel Butirito Police Post."

What led to these remarks we do not know. There was perhaps an interchange between the prosecutor and the magistrate. Without more ado the prosecution witnesses were called, and the appellant was asked if he wanted to cross-examine them. He did not do so, and the magistrate recorded that the appellant "still adopted the attitude that he is an idiot and unable to speak". Three prosecution witnesses testified to the appellant's ability to speak. Indeed one witness said, or is recorded as having said "We took the two accused to de Bastard's Police Post . . . where accused No. 2 immediately said he was an idiot and unable to speak". Perhaps what the witness said was "The accused pretended that he was an idiot". The

magistrate obviously felt anxiety over the matter, and after hearing

the prosecution witnesses, adjourned so that he could hear the police officer in charge of de Bastard's Police Post, and the chief of the appellant's manyatta.

The police officer swore that the appellant could hear and speak reasonably well. The chief swore that the appellant was not able to speak. He said "We speak to him by hand signs, and he replies in the same way".

The prosecution closed their case at that point. The appellant's co-accused was given an opportunity to make his defence, but it does not appear that this appellant was asked any questions, the magistrate feeling perhaps that to do so would be futile, whether or not the appellant was playing the fool. In his judgment the magistrate stated:

"Accused 2 is apparently dumb, though the evidence of police witnesses indicates that he was able to talk, and the chief of the two accused confirms that they are able to communicate with him by hand signs. I consider despite his disability, he is well aware of what goes on around him, and is able to understand what is required of him."

It is not easy to gather what the magistrate's precise finding was. Had he made a definite finding that the appellant in his opinion had been feigning throughout the trial the situation might possibly have been saved, but he does appear to have been undecided. No one, clearly, made any attempt to communicate by signs during the trial, but the magistrate was somewhat inclined, we think, to the view that this was the only means of communication, after he had heard the chief. However, apart from this lack of precision, the magistrate, we speak with respect, allowed affairs to get back to front. At the outset he was faced with the possibility that the appellant even if he could talk, could not hear, and with the further possibility that the appellant could neither hear nor talk. It was at that stage that he should have made full inquiry. There is little guidance for magistrates who are faced with problems of this kind in that part of the Criminal Procedure Code which deals with pleas, but ss. 162 and 167 of that Code remove all technical difficulties, though practical difficulties may remain.

If an accused stands before the court dumb, and apparently without comprehension, as it would seem that the appellant did, the court before proceeding with the trial should consider whether there is reason to believe that the accused is of unsound mind. There are, of course, practical difficulties in deciding whether an accused is playing the fool or not. It may be quite obvious that he is playing the fool. If that is so the court is entitled, having entered a plea of "not guilty" to proceed with the trial. In most cases, however, it will be wise to have the accused examined by a doctor, even if this entails considerable delay. A doctor, without much difficulty, will be able to ascertain whether the accused is deaf or not, and, though this will be more difficult, whether the accused is rational. It may of course be possible, without medical evidence, to say that the accused is deaf, but is of perfectly sound mind, in which case, as in a case where a doctor has said that the accused is deaf but sane, inquiry will turn on whether the accused can be made to understand the proceedings. In such cases some such witness as the chief who was called in the present case, should be examined at the outset. If on hearing a witness of that kind the magistrate finds that intelligence can be conveyed to, and received from, the accused by means of signs there is no reason, if the communication is adequate, why the accused should not be tried through the medium of sign language. It will be a question of degree in each case. To take an extreme example, not likely to be in point at a place such as Rumuruti, an accused who is a complete master of a scientific deaf and dumb alphabet will be perfectly capable of understanding very complicated proceedings, if an equally skilled interpreter can be found. On the other hand, a deaf mute from a small village, who communicates with his fellow villagers through the medium of some homemade sign language may not, through that

medium, be capable of understanding

adequately proceedings of a complex nature. The question in each case may be stated in this way – taking into account the nature of the charge and the evidence likely to be adduced, are the means of communication available adequate to ensure that the accused will have a full and proper understanding of the allegations made against him, and of what the prosecution witnesses are saying about him? Further, can the rights of the accused be adequately explained to him and can he avail himself of those rights? If in these respects the means of communication with the accused are adequate, the trial may proceed in the normal way, the person chosen to communicate by signs with the accused being sworn in much the same way as an interpreter is sworn. The person chosen is in fact an interpreter, though not an interpreter of the spoken word.

If however communication adequate for the purposes of the case cannot be established the court will make a finding under s. 167 to the effect that the accused, though not insane, cannot be made to understand the proceedings. The trial will then proceed and the provisions of s. 167(1)(a) will be followed.

In the present case we cannot say whether the conviction was justified, or whether the proper order was to detain the appellant during the Governor's pleasure. We cannot say whether the appellant was or was not capable of following the evidence or of understanding his rights.

The case must clearly be sent back for a re-hearing of the same charge before another magistrate of competent jurisdiction who shall, at the very outset of the proceedings, conduct an inquiry in the light of what we have said, and we so order.

To sum up, (a) the magistrate who re-hears the case shall first consider the question of sanity; (b) if the accused is considered sane the question whether he is in fact deaf or dumb or both, must be considered; (c) if the accused is deaf, or dumb, or both the question whether he can by sign or otherwise be made adequately to understand the proceedings must next be considered, and provision for a suitable "interpreter" must be made; (d) if the man is insane s. 162 must be followed; (e) if the man though not insane cannot be made to understand the proceedings, s. 167 must be followed; (f) if the man can in one way or another be made to understand the proceedings the trial, with the aid of a "sign interpreter" if necessary, will proceed in the normal way. The appellant shall remain in custody until he is re-tried.

The prosecution may well wish to take advantage of the opportunity afforded to have this appellant medically examined. Apart from all other considerations, a very low standard of mental development, if it exists, may have some bearing upon sentence.

Appeal allowed. Order for re-trial before another magistrate with a direction that an inquiry be conducted at the outset whether the appellant can understand the nature of the proceedings.

The appellant did not appear and was not represented.

For the respondent:

Attorney-General, Kenya

M. A. Rana (Crown Counsel, Kenya)

Haj Mohammed Ali Abdoo and others v Sheikh Kamel Abdul Saleh

[1964] 1 EA 115 (CAA)

Division:	Court of Appeal at Aden
Date of judgment:	21 January 1964
Case Number:	71/1963
Before:	Crawshaw Ag VP, Newbold and Crabbe JJA
Sourced by:	LawAfrica
Appeal from:	The Supreme Court of Aden – Blandford, J.

[1] Injunction – Management of public charitable trust – Declaratory action to establish rights of parties to manage mosque – Indirect object of action to remove committee of management – Whether prior consent of Attorney-General necessary – Jurisdiction of court to grant injunction – Civil Procedure Ordinance, s. 90 (A).

Editor's Summary

The appellants were the management committee of a mosque and the respondents were worshippers there. The respondents sued the appellants seeking a declaration that the mosque, its funds, revenues and movable properties constituted a public trust for religious purposes and that the appellants had no right, title or interest therein except as members of the Muslim community of Sheikh Othman who worship at the mosque and no right to arrogate to themselves to the exclusion of others having a like interest, the management of the mosque, its funds, revenues or movable properties whether by execution of a deed of waqf or otherwise. After filing the plaint the respondents sought ex parte an injunction restraining the appellants from executing a waqf deed dedicating the mosque as a waqf. At the hearing of this application the appellants objected that as the issue for consideration fell within s. 90 of the Civil Procedure Ordinance, the consent of the Attorney-General was necessary but had not been obtained to the institution of the suit, and accordingly the court had no jurisdiction to hear the suit or make an interlocutory order. Section 90 provides that the suit must either be founded on an allegation of a breach of trust or its purpose must be to show that the court's direction is necessary for the administration of the trust, and the remedy sought must come within one of the paragraphs to sub-s. (1), the relevant ones of which are "removing any trustee" under para. (a), "setting a scheme" under para. (g) or "granting such further or other relief as the nature of the case may require" under para. (h). In granting the injunction the judge held that before s. 90 of the Civil Procedure Ordinance can apply one of two basic requirements must exist, that both existed but that since the remedy sought did not fall within sub-s. (1) the consent of the Attorney-General was not required. On appeal the substantial point argued was whether the remedy sought fell within s. 90(1) of the Ordinance.

Held –

- (i) the relief sought fell within the terms of para. (a) of s. 90(1);
- (ii) therefore s. 90 applied to the suit and under sub-s. (2) the respondents were precluded from instituting the suit until the requisite consent had been obtained;
- (iii) it would be quite wrong for the court to grant an injunction on an interlocutory application in terms

of the prayer of a suit which itself could not be brought.
Appeal allowed. Order granting injunction set aside.

Judgment

The following judgments were read. **Crawshaw Ag VP:** The appellants ask us to set aside an injunction granted by the lower court restraining the appellants from executing a waqf deed dedicating as waqf a certain mosque which the appellants have been managing over a period of some years. The injunction was made on the application of the respondents and was to remain in force pending the hearing of the suit, in which the respondents were the plaintiffs and the appellants the defendants.

The respondents are Muslim worshippers in the mosque and were given leave by the court to sue not only on their own behalf but as representing also “all persons interested” in the mosque. In their plaint they described the appellants as being “constructive trustees”. It seems that the first appellant was the principal promoter of the plan to build a mosque, and with others of the appellants formed the first managing committee. They collected subscriptions from the public, obtained from the Government the allocation of a piece of land in 1957 (although no formal lease had been issued at the time the suit was filed and still may not have been), supervised the building of the mosque, and have since, with the other appellants acted as a management committee not only of the mosque, but also of other properties, the rents of which provide revenue for the mosque.

The plaint was filed in November, 1962, and the prayer is for a declaration in terms of para. 11 (i) thereof and an injunction in terms of para. 11 (ii); these paragraphs read:

- “11(i) A declaration that the mosque and its funds, revenues and movable properties constitute a public trust for religious purposes; that the defendants have no other or greater right, title or interest therein than such as the plaintiffs possess in their capacity as members of the Muslim Community of Sheikh Othman who worship at the mosque; and, accordingly that the defendants have no legal right to deal with or manage the Mosque, its funds, revenues and movable properties in derogation of the rights of the plaintiffs or, more particularly, to arrogate to themselves to the exclusion of others having a like interest, the management or control of the mosque, its funds, revenues or movable properties, whether by the execution of a deed of waqf in terms similar to those of the revised draft filed herewith or otherwise.
- (ii) A perpetual injunction restraining the defendants from dealing with or managing the mosque, its funds, revenues or movable properties in derogation of the rights of the plaintiffs and others beneficially interested as aforesaid or arrogating to themselves, to the exclusion of the plaintiffs and such others, the management or control of the mosque, its funds revenues or movable properties, whether by the execution of a deed of waqf or otherwise.”

Paragraph 9 of the plaint reads:

- “9 The defendants have no right, title or interest to or in the land on which the mosque stands; and none of them has any greater right or interest in the institution of the mosque or its funds, revenues and movable properties than the plaintiffs and other members of the Muslim Community of Sheikh Othman who worship at the mosque.”

The appellants objected to the granting of the temporary injunction on a number of grounds, the only one of which I think I need mention being that as the consent of the Attorney-General to the institution of the suit had not been obtained as required by s. 90 of the Civil Procedure Ordinance, there was no jurisdiction in the court to hear the suit and therefore no jurisdiction to make an interlocutory order therein. Section 90 says that no suit shall be instituted without such consent where any of certain specified reliefs are asked for “in the case of any alleged breach of any express or constructive trust

created for public

purposes of a charitable or religious nature, or where the direction of the court is deemed necessary for the administration of any such trust . . .”; the learned judge held that the intention of the appellants to create a waqf would, on the allegation of the respondents, amount to a contemplated breach and came within the section, and also that the direction of the court was being sought by the respondents for the administration of the trust. He found however that none of the reliefs mentioned in the section was being asked for, and that therefore no consent was required.

The appellants on appeal maintain that the plaint does embody some of the reliefs, whilst the respondents say that the judge, whilst right in finding that was not so, was wrong to find the other conditions of the section were present in that no breach of trust was alleged in the plaint, nor were directions as to the administration of the trust called for.

I do not find it necessary to decide whether the judge was right as to a breach of trust, although I see in Chitaley on the Indian Civil Procedure Code (7th Edn.), p. 1157, in the commentary to s. 92 (which is similar to Aden’s s. 90) a note of a case which reads:

“It is as much a breach of trust for a person not entitled to act as trustee to meddle with trust property as it is for a properly appointed trustee not to manage the property.”

I am afraid I have not studied the case, and in any event counsel for the respondents would, I think, say (although I doubt if I should agree with him) that the plaint does not go so far as to say expressly or by implication that the appellants have no right to carry out acts of trusteeship. What he does say is that the plaint asks for a declaration that the appellants have no legal right to manage the mosque and deal with the trust property “in derogation of the rights” of the respondents. The only meaning I can attribute to that is that all worshippers who use the mosque have an equal right with the appellants to manage the mosque and control the trust property. It seems clear to me that if the court was to make a declaration and grant an injunction in the terms of para. 11 of the plaint, it would amount to a direction affecting the due administration of the trust.

It is therefore necessary to consider whether the plaint asks for any of the reliefs (*a*) to (*h*). Counsel for the appellants claims that (*a*), (*g*), and (*h*) are all relevant. (*a*) is “removing any trustee”, and he submits that the effect of the declaration would result in the appellants virtually losing their constructive trusteeship. I think he is right, for any number of other people might acquire the trust property (e.g. the rents) and manage the mosque, leaving no acts of trusteeship for the appellants. If not strictly coming within (*a*) it seems to me that (*h*) would anyway apply; (*h*) reads: “granting such further or other relief as the nature of the case may require”. This, I think it is admitted, should be read ejusdem generis one or other of the other reliefs, and the reliefs asked for in the plaint are certainly of a nature which would substantially remove from the present constructive trustees the powers they at present exercise, and would create a large number of other potential trustees; (*g*) is “settling a scheme”.

It is not the respondents of course who ask that the court approves a waqf, if a waqf could be described as a scheme, but counsel for the appellants I think submitted that the relief the respondents have asked for comprised a scheme in that directions would be given as to the future management of the trust. I am not sure that (*g*) is applicable, but for the views I have otherwise expressed it is not necessary to decide that point.

I would allow the appeal on the basis that consent was required for the institution of the suit, which consent had not been obtained. I would award to the appellants the costs in this court and in the court below.

Newbold JA: This appeal presents two unusual features: first, although the appeal is in form an appeal against an order made on an interlocutory application, nevertheless by reason of the issues raised, a decision on this appeal in effect would be a decision on the suit itself; secondly, we have been informed during the hearing of the appeal that the consent of the Attorney-General has been obtained to the filing of another suit, and therefore any decision on this appeal and, presumably on the suit which has given rise to it would be virtually academic, save of course in respect of that very important matter of costs.

The facts of the case have been sufficiently stated by my brother Crawshaw and I find it unnecessary to restate them to any appreciable extent. I should, however, like to refer the fact that the averments in the plaint, so far as they are material in this appeal, are as follows: First, that the mosque and its funds are devoted to public purposes of a religious nature (if I may pause here for a moment, that is one of the few bits of common ground and therefore clearly there is no argument in relation to that aspect of s. 90); then, that the mosque and funds are the subject of a constructive trust; then, that the defendants are constructive trustees; then, that the defendants have no greater interest in the mosque and funds than the plaintiffs and other worshippers; and then that the defendants threatened to execute a waqf which would in fact perpetuate the existing position. Following these averments there is a two-fold prayer for a declaration and an injunction and I find it unnecessary to read the specific words as they have already been read by my brother Crawshaw.

After the filing of the plaint the plaintiffs obtained an ex parte order for an injunction which, on application and after argument, was subsequently extended until the decision on the suit. This appeal arises from that order extending the interim injunction. The issue before the judge on the application and, indeed before this court is whether the plaint could by reason of s. 90 of the Civil Procedure Ordinance be brought without, as is the case, the consent of the officer appointed for the purpose, which officer we are informed was the Attorney-General. The appellant alleges that it could not be so brought because the plaint fell within the terms of that section. Section 90 reads, so far as is material, as follows:

“90(1) In the case of any alleged breach of any express or constructive trust created for public purposes of a charitable or religious nature, or where the direction of the court is deemed necessary for the administration of any such trust, such officer as the Governor may appoint in this behalf, or two or more persons having an interest in the trust and having obtained the consent in writing of the officer so appointed, may institute a suit, whether contentious or not, in the Supreme Court to obtain a decree. . . .”

Then follow a number of paragraphs of which three only are relevant:

“(a) removing any trustee;”

.

(g) settling a scheme; or

(h) granting such further or other relief as the nature of the case may require.

(2) No suit claiming any of the reliefs specified in subsection (1) of this section shall be instituted in respect of any such trust as is therein referred to except in conformity with the provisions of that subsection.”

As I have stated, the particular requirement which is common ground is that the trust has been created for public purposes of a charitable or religious

nature. The trial judge held that before s. 90 can have any application there must exist one of two basic requirements and, also, the remedy sought must come within one of the paragraphs to sub-s. (1). The trial judge held that both the basic requirements existed but that the remedy sought did not fall within any of the paragraphs and, consequently, that the plaintiffs were able to bring the action without the consent of the Attorney-General and were thus, on the facts alleged, entitled to the interim judgment. The defendants appealed on the ground, *inter alia*, and I find it unnecessary to refer to the other grounds urged by counsel for the appellants – that the remedy sought does, contrary to the decision of the trial judge, fall within one or other of paras. (a), (g) and (h). The plaintiffs contest this; and also, having sought and obtained the leave of this court to argue a point on which they had not given notice as required by r. 65, they seek to urge this court to upset the decision of the trial judge in so far as the trial judge had held that the two basic requirements existed.

These two requirements, which are alternative and if either of them exist then to that extent the section is satisfied, are, first, that the plaint must allege a breach of trust or, secondly, that the plaint must ask the direction of the court as deemed necessary for the administration of the trust.

As regards the first of these alternative requirements, that is the breach of trust, the trial judge held that while there was no allegation of an express breach of trust nevertheless there was an allegation of a threatened breach of trust and that, on the basis of a *quia timet* action, a threatened breach of trust comes within the words of the section requiring the allegation of a breach of trust. I find it unnecessary to come to a conclusion on that matter. There are arguments in favour of it, which arguments were referred to by the trial judge, but there are equally strong arguments to the contrary.

I turn now to the second of the alternative requirements, which is that the direction of the court must be sought for the administration of the trust. The precise words are: “where the direction of the court is deemed necessary for the administration of any such trust”. As what is sought is a declaration that the defendants have no right to deal with or to manage the mosque and its funds in derogation of the rights of the plaintiffs and other worshippers, and as there is also sought an injunction restraining the defendants from dealing with and managing the mosque and its funds in derogation of such rights, I am quite unable to see how it can possibly be argued that the direction of the court is not deemed necessary for the administration of the mosque and its funds. This is precisely what is sought. The dealing with the management of the mosque and its funds must of necessity be a dealing in relation to the administration of the trust and I would draw attention to the word “for” in the section. The requirement is “. . . or where the direction of the court is deemed necessary for the administration . . .” Where what is sought is a declaration that the trustees who are in fact managing the trust funds have no right to do so any more than the *cestuis que trust* and that they should be restrained from doing so, I personally am unable to see how this is anything other than a request that the court give a direction for the administration of the trust. This being so I entirely agree with the trial judge in his conclusion that this basic requirement of the section is satisfied.

I turn now to that aspect of the matter on which the trial judge held against the defendants, who are the appellants on appeal, that is, whether the remedy sought comes within the provisions of any of the paragraphs set out in sub-s. (1). I will turn first to para. (a) which is: “removing any trustee”. It is clear beyond doubt that there is no specific prayer for the removal of the trustees, therefore the remedy does not come within para. (a). Does it, however, come within para. (h)? This paragraph has been interpreted by the courts of India as not being restricted to consequential relief but as requiring the remedy sought to be

ejusdem generis with the remedies specifically referred to in the preceding paragraphs. I entirely agree with these decisions in so far as they are to the effect that the paragraph is not restricted to consequential relief. I find it unnecessary to arrive at a conclusion whether it is to be read ejusdem generis, because in my view, the relief sought on this plaint is of similar nature to that specified in para. (a), that is the removal of a trustee. Obviously the prayer does not have to require specifically the removal of a trustee as if it did it would come within para. (a). But is it of the same nature? I have already stated generally the nature of the relief sought. Specifically it is that the defendants, who are the trustees, be restrained

“from dealing with or managing the mosque, its funds, revenues or movable properties in derogation of the rights of the plaintiffs and others beneficially interested as aforesaid or arrogating to themselves, to the exclusion of the plaintiffs and such others, the management or control of the mosque, its funds revenues or movable properties whether by the execution of a deed or waqf or otherwise.”

I have no doubt that what is sought in that case is an injunction precluding the trustees from dealing with this property without at the least giving an equal right to every other member of a big and nebulous public. I can see in that nothing other than in effect the relief that the defendants should cease to exercise the functions which they exercise up to date in the management of the affairs of this mosque. If there is any difference between a decision granting such relief and one granting specific removal of a trustee I am unable to see it. Counsel for the respondents has urged that though the terms of the prayer are wide, nevertheless, having regard to the averments in the plaint, those terms should be construed as restricted to an injunction precluding the defendants from executing a waqf in terms of the exhibit in the court and, indeed, that is all that the interim injunction which is the subject of this appeal does. I do not consider that the terms of the prayer in these circumstances should be restricted by reference to the averments in the plaint because it would always be open to a plaintiff to ask the court to grant the relief in the widest possible sense. But, nevertheless, whatever may be the true position in that respect, the submissions are completely undermined by the terms of the prayer itself, because the concluding words of that prayer are as follows, “whether by the execution of a deed or waqf or otherwise”. For these reasons I find it unnecessary to refer to para. (g) as I am satisfied that the relief asked for falls within the terms of para. (a).

I am satisfied, therefore, that the learned judge erred in coming to the conclusion that the relief sought did not come within sub-s. (1). Being so satisfied it is clear that s. 90 applied to the suit and under sub-s. (2) of that section the plaintiffs are precluded from instituting the suit until the requisite consent has been obtained. This appeal does not deal with the suit itself, but if the plaintiff is precluded by statute from bringing the suit then, in my view, it would be quite wrong for the court on an interlocutory application to grant an injunction in the terms of the prayer of a suit which cannot be brought.

For these reasons I consider that the trial judge was wrong and that this appeal should succeed. I agree with my brother Crawshaw that it should be allowed with costs and that the order of the trial judge granting the injunction should be set aside and that the costs of the application before him should be granted to the defendants.

Crabbe JA: In this case there can be no doubt that the trust in question is a public charitable trust created for religious purposes, and in view of the preliminary objections raised by the defendants the learned judge had to consider whether the suit fell within s. 90 of the Civil Procedure Ordinance. For a

suit to fall within the section either (1) it must be founded on an allegation of a breach of trust or (2) its purpose must be to show that the court's direction is necessary for the administration of the trust.

The plaintiffs did not allege any breach of trust, but in his ruling the learned judge said:

"So far as concerns this present suit the plaintiffs allege in para. 10 of the plaint that the defendants intend to act in derogation of the rights of the plaintiffs and those they represent and to arrogate to themselves in perpetuity the management and control of the assets of the mosque, which are not theirs to deal with in such a way. This I regard as an allegation of an intended breach of trust the proof of which is essential if the plaintiffs are to succeed in obtaining the permanent injunction they seek. It therefore appears to me that this suit falls within the first of these two alternative conditions.

I am further of the opinion that the suit falls as well within the second of the alternatives, namely that the plaintiffs are endeavouring to show that the direction of the court is necessary for the administration of the trust. In India the corresponding words in s. 92 of the Indian Civil Procedure Code have been interpreted as meaning 'where the court has to give directions in the nature of framing a scheme or otherwise for the administration of the trust'. Even if a similarly restrictive interpretation is placed on the same words in the Aden Ordinance it seems to me that the purpose of this suit falls within the scope of these words.

The suit does not contain a prayer for the settlement of a scheme but the declarations and injunctions sought, when viewed in the light of the complaints regarding the contents of the draft deed of waqf (which might in itself be regarded as equivalent to a proposed scheme), indicate a submission that the court's directions as to future administration of the trust are requisite."

Later the learned judge said:

"The suit may not relate to all aspects of administration, but in my view it relates to sufficient to bring it within the operation of the section."

For the defendants counsel submitted that the suit amounted in effect to an application for removal of the defendants as trustees and secondly for the settlement of a scheme. Whilst disagreeing with counsel for the defendants in the first submission the learned judge accepted his second submission though with some reservation. He said however:

"The only other item which requires consideration in this context is item (g) namely a decree for 'settling a scheme'. Counsel for the defendants said that the suit amounted to a prayer for such relief. I have no doubt that that is what the plaintiffs really want but they know they cannot seek that remedy unless they have first obtained the consent of the Attorney-General. In itself their claim is not for the approval of a scheme, but is it of that nature?"

The learned judge himself observed that the suit was clearly an attempt to evade the restrictions of s. 90 of the Ordinance, and in my view the plaintiffs cannot use the court to achieve that object. It is clear to me that the suit is in substance an action to effect the settlement of a scheme and to obtain in effect the removal of the defendants as trustees.

I disagree with the learned judge that an injunction order against the defendants does not amount to their removal. In my view an order for perpetual injunction restraining the defendants from dealing with the trust property such

as is contained in the plaintiffs' prayer would render the defendants impotent from discharging their duties under the trust and in my opinion would be tantamount to a removal.

An injunction is an equitable remedy, and the court of equity looks at the substance rather than to the form. The form in which the suit is brought has the effect of circumventing s. 90, but in substance it is within it. The suit was not brought in conformity with that section. In these circumstances I think the learned judge erred in granting the order for an interim injunction.

I would also allow this appeal.

Appeal allowed. Order granting injunction set aside.

For the appellants:

P. K. Sanghani, Aden

For the respondents:

Horrocks, Williams & Beecheno, Aden

G. Horrocks

Maulidi Abdullah Chengo v Republic [1964] 1 EA 122 (HCT)

Division:	High Court of Tanganyika at Dar-es-Salaam
Date of judgment:	11 October 1963
Case Number:	576/1963
Before:	Sir Ralph Windham CJ
Sourced by:	LawAfrica

[1] Criminal law – Practice – Amendment of charge – Charge of stealing by servant – Evidence adduced proving charge – Evidence also sufficient to justify conviction of graver offence – Defence case closed – Subsequent amendment of charge to allege graver offence – Accused given opportunity to recall witnesses – Conviction of graver offence – Whether amendment permissible on ground that charge defective – Whether amendment made “without injustice” to accused – Criminal Procedure Code (Cap. 20), s. 209(1)(T).

Editor's Summary

The appellant was charged with stealing by a servant and the prosecution evidence, which the magistrate accepted, was ample to support a conviction. The evidence was also sufficient to support a conviction of housebreaking and theft and the magistrate, after the close of the defence, purporting to act under s. 209 of the Criminal Procedure Code, amended the charge and substituted a charge of housebreaking and

theft. The magistrate in amending the charge complied with the safeguards for an accused made by the two provisos to s. 209(1). It was common ground that the amended charge carried a more severe penalty than the original charge. On appeal,

Held –

- (i) the necessary prerequisite to the application of s. 209 of the Criminal Procedure Code at all is that the charge should be defective and as there was nothing defective in the original charge of stealing by a servant the magistrate erred in holding that s. 209(1) was applicable;
- (ii) the provision in s. 209(1) that, when the charge is defective, the court may either amend it or substitute or add a new charge does not detract from the necessity that the charge must first be shown to be defective; the original charge was not defective because the evidence adduced would also support another charge for a different offence;
- (iii) that the evidence adduced would have supported a conviction for the more serious offence of housebreaking and theft was wholly outside the ambit of

s. 209(1), *ibid.*, and the substitution at such a late stage of the charge of house-breaking and theft could not be said to have been made “without injustice” to the appellant, notwithstanding the magistrate’s compliance with the provisos to that subsection.

Appeal allowed. Convictions of housebreaking and theft quashed and sentences set aside. Conviction of stealing by a servant substituted.

Cases referred to in judgment:

- (1) *Mbithi Kisoi v. R.* (1955), 22 E.A.C.A. 484.
- (2) *R. v. Pople*, [1951] 1 K.B. 53.

Judgment

Sir Ralph Windham CJ: The appellant was charged with the offence of stealing by a servant, the offence being contrary to s. 265, and being punishable under s. 271, of the Penal Code, the particulars alleging that he stole his employer’s clothes from the latter’s house, in which he was a house-servant. He pleaded not guilty. The prosecution evidence, which the trial magistrate accepted, was amply sufficient to support a conviction for the offence charged, an offence which the appellant in sworn evidence denied having committed, saying that the clothes were his own. The prosecution had also adduced evidence upon which the appellant could have been convicted of housebreaking and theft contrary to ss. 294(1) and 265 respectively of the Code, if the appellant had been charged with housebreaking. A week after the close of the defence the trial magistrate, in open court and in the presence of the appellant, who was undefended, amended the charge to housebreaking and stealing, the following being his entry on the record:

“The prosecution established a case of housebreaking and stealing against the accused, but have charged him with the offence of stealing by servant contrary to s. 271 of the Penal Code. Even at this stage of the trial it is not too late for me to amend the charge under s. 209 of the Criminal Procedure Code, and this can be done without injustice to the accused. In this connection I bear in mind that an offence contrary to s. 294(1) of the Penal Code is a “scheduled offence” under the Minimum Sentences Act, whereas the offence with which the accused was originally charged is not.”

After observing that the fact that housebreaking carried a more severe penalty than theft by a servant could not be said to do injustice to the accused in the event of the charge being altered to charges of housebreaking and theft, he then proceeded to “amend the charge to one of housebreaking and stealing contrary to ss. 294(1) and 265 of the Penal Code”. The amended charges, with their particulars, were then read to the accused, who pleaded to them in the words – “I have already said that the clothes are my property. I did not steal them. I was not employed by the complainant and I did not break open the door.” The plea was entered as one of not guilty to the new charges, and the accused was informed that he had a right to recall any or all of the witnesses, whereupon he replied – “The court should give judgment. I do not wish to recall the witnesses.” The trial magistrate thereupon delivered a judgment in which, after stating that he accepted all the prosecution evidence including the complainant’s evidence that he had locked the door of his room and later found it broken open, he found the appellant guilty of housebreaking and of theft and proceeded to pronounce one sentence only, namely that of two years’ imprisonment and 24 strokes of corporal punishment, that being the statutory minimum penalty for housebreaking.

Upon this appeal coming up for hearing (the appellant having elected not to be present) I was very surprised when learned State Attorney supported the

validity of this last-moment alteration of the charge against the appellant to one of a different nature carrying a more severe penalty, and argued strongly in favour of the magistrate's view that what he had done fell within his powers under s. 209(1) of the Criminal Procedure Code. It is true that, having formed that opinion, the magistrate was scrupulous to comply with the safeguards provided in accused's favour by the two provisos to s. 209(1). But he clearly erred in holding that the section applied at all to a case such as this. Section 209(1), without its provisos, reads as follows:

“209. (1) Where, at any stage of a trial, it appears to the court that the charge is defective, either in substance or form, the court may make such order for the alteration of the charge either by way of amendment of the charge or by the substitution or addition of a new charge as the court thinks necessary to meet the circumstances of the case unless, having regard to the merits of the case, the required amendments cannot be made without injustice, and all amendments made under the provisions of this subsection shall be made upon such terms as to the court shall seem just.”

From this it is clear that the necessary prerequisite to the application of s. 209 at all is that the charge shall have been defective. But in the present case there was nothing defective at all in the original charge. The charge was good, the evidence accorded with it, and the appellant could have been convicted on it. The fact that the evidence would have supported a conviction for a more serious offence was wholly outside the ambit of s. 209(1). The limited scope of such a section was made quite clear by the Court of Appeal for Eastern Africa in *Mbithi Kiso v. R.* (1), when considering s. 260(2) of the Tanganyika Criminal Procedure Code, which gives powers in respect of informations similar to those which s. 209(1) gives in respect of charges. Both sections are prefaced by words which provide that where at any stage of the trial “it appears to the court that the information (or charge) is defective, the court shall (or may) make such order for the alteration of the information (or charge) . . .” etc. In construing these words, and in holding that s. 260(2) was inapplicable, the court observed (22 E.A.C.A., at p. 486):

“In fact this is not a case of a defective information at all. The defect was not in the information, but in the prosecution evidence which could not support the charge . . .”.

The present case is even stronger, for not only was the charge free from defect, but the prosecution evidence did support it. I would refer also to the corresponding English provision, s. 5(1) of the Indictments Act, 1915, upon which our ss. 260(2) and 209(1) are based. In construing the word “defective” in that section in *R. v. Pople* (2), the Court of Criminal Appeal said ([1951] 1 K.B., at p. 54):

“The argument for the appellants appeared to involve the proposition that an indictment, in order to be defective, must be one which in law did not charge any offence at all and therefore was bad on the face of it. We do not take that view. In our opinion, any alteration in matters of description, and probably in many other respects, may be made in order to meet the evidence in the case so long as the amendment causes no injustice to the accused person.”

This gives a fairly wide meaning to the word “defective”. But it is still not wide enough to cover the present case. For in the present case no alteration of wording of the charge was necessary, either by reason of any original defect in it or in order to “meet the evidence in the case”. Only in such an event could the charge be said to be “defective”. And the provision in s. 209(1) that, when the charge is

defective, the court may either amend it or substitute or add a new charge does not detract from the necessity that the charge must first be shown to be defective. The fact that the evidence adduced could also support another charge, for a different offence, does not render the existing charge defective.

I would also draw attention to the further observations in the judgment in *R. v. Pople* (1) (ibid., at p. 55), bearing in mind that s. 5(1) of the Indictments Act, 1915 (U.K.), like s. 209(1), enables the amendment to be made “at any stage of a trial”. The court said:

“The responsibility for the correctness of an indictment lies in every case on counsel for the prosecution and not on the court. No counsel should open a criminal case without having satisfied himself on that point. If in his opinion the indictment needs amendment, the necessary application should be made before the accused are arraigned and not, as in this case, after all the evidence for the prosecution has been called. There may well be amendments which would properly be made at the beginning of a trial which would be oppressive and embarrassing to the accused if made at the close of the case for the prosecution.”

In the present case the amendment was made, not at the close of the case for the prosecution, but after the close of the defence, and it took the form of the substitution of an entirely new charge for a more serious offence. Such a substitution at such a late stage not only did not fall within s. 209(1) at all, but it is difficult to see how it could be held to have been made “without injustice” to the appellant, notwithstanding the magistrate’s compliance with the provisos to that subsection. Finally, this was not a case to which any of the sections from 181 to 187 of the Criminal Procedure Code were applicable, which provide for the conviction of an accused, in certain cases, for an offence with which he was not charged.

For these reasons I hold that the substitution of the charges of housebreaking and theft for that of stealing by a servant was bad. The conviction of the appellant on those substituted charges, together with the statutory minimum penalty for the offence of housebreaking, are set aside. The appellant will be convicted of the offence of stealing by a servant, as originally charged, for which offence he will, in view of his admitted five previous convictions for similar offences, be sentenced to imprisonment for two years, without any corporal punishment.

Appeal allowed. Convictions of housebreaking and theft quashed and sentences set aside. Conviction of stealing by a servant substituted.

The appellant did not appear and was not represented.

For the respondent:

Director of Public Prosecutions, Tanganyika

K. R. K. Tampi (State Attorney, Tanganyika)

Hassan Salum v Republic
[1964] 1 EA 126 (HCT)

Division:	High Court of Tanganyika at Dar-es-Salaam
Date of judgment:	23 October 1963
Case Number:	638/1963

Before: Spry J
Sourced by: LawAfrica

[1] Criminal law – Evidence – Opinion of expert – Forgery – Handwriting expert – Opinion that forged signature written by accused – Weight to be given to such opinion.

Editor's Summary

The appellant, a messenger, was charged with forgery, uttering a forged document and stealing. It was alleged that he had forged a postal receipt for a registered letter, uttered it to a post office clerk, thereby obtaining the letter and stealing the contents. The only evidence against the appellant was of opportunity to commit the offences and of a handwriting expert who stated that he had compared the signature on the postal receipt with a letter written by the appellant and specimens of the handwriting of the appellant and two other messengers in the same employment as the appellant and he had come to the conclusion that the signature on the receipt and the letter were written by the same person, who was the appellant. On appeal from his conviction of the offences charged,

Held –

- (i) the most that an expert on handwriting can properly say, in an appropriate case, is that he does not believe a particular writing was by a particular person or, positively, that two writings are so similar as to be indistinguishable; the handwriting expert should have pointed out the particular features of similarity or dissimilarity between the forged signature on the receipt and the specimens of handwriting.
- (ii) the evidence showed that the appellant had the opportunity to commit the offences and that the forged signature might have been written by him, but this fell far short of proving beyond reasonable doubt that the appellant was in fact the forger;
- (iii) there was no evidence that the appellant was guilty of the uttering or the stealing and these were distinct offences which were not proved.

Appeal allowed. Convictions quashed and sentences set aside.

Cases referred to in judgment:

- (1) *Wakeford v. Lincoln (Bishop)* (1921), 90 L.J.P.C. 174.
- (2) *R. v. Podmore* (1930), 46 T.L.R. 365; 22 Cr. App. Rep. 36.

Judgment

Spry J: The appellant was charged with the offences of forgery, uttering a forged document and stealing. It was alleged that he forged a postal receipt for a registered letter, uttered it to a post office clerk, thereby obtaining the letter, of which he is alleged to have stolen the contents.

The only evidence against the appellant was, first, the evidence of a police officer who is said, as part of his duties, to have specialised in the study of hand-writing and, secondly, evidence of opportunity.

To take the second first, little weight can be given to the evidence of opportunity. The appellant himself said that he was employed as a messenger by the City Council of Dar-es-Salaam and it may be assumed from his evidence – it was not

proved by the prosecution – that one of his duties was to collect letters from the post office. It was not proved how many other messengers are employed on this duty and who may therefore have had an equal opportunity. Furthermore, the appellant in his evidence said that it was not his duty to distribute letters but merely to put them in pigeon-holes. This was not rebutted by the prosecution. It may be said therefore that while the appellant had the opportunity to commit the offence, an indefinite number of other persons may have had a like opportunity.

The handwriting expert said that he had compared the signature on the postal receipt and also a letter apparently written by the guilty person in an attempt to cover up the offence, with specimens of the handwritings of the appellant and two other messengers employed by the City Council. He came to the conclusion that the signature on the receipt and the letter were written by the same person but were not in the handwriting of either of the other two messengers, but had been written by the appellant and he added “of this I have no doubt whatever”. He produced photographic enlargements of specimen letters and described them as “identical in style, character and palm lifts” and said that the only discrepancies that appeared were due to the normal variations that occur in the writing of a person at different times and under different conditions.

The learned magistrate correctly directed himself that the evidence of the handwriting expert was an opinion only and that the matter was one on which the court had to make a finding. He inspected the specimens of handwriting himself and found that the forged document, that is, the postal receipt, had been written by the appellant.

At the hearing of the appeal, I was not referred to any authority on the weight to be given to such evidence and, indeed, there appears to be remarkably little. The only reported case which I have discovered which is of assistance in the present case is *Wakeford v. Lincoln (Bishop)* (1) in which Lord Birkenhead observed:

“The expert called for the prosecution gave his evidence with great candour. ‘It is not possible,’ he says, ‘to say definitely that anybody wrote a particular thing. All you can do is to point out the similarities and draw conclusions from them’. This is the manner in which expert evidence on matters of this kind ought to be presented to the court, who have to make up their minds, with such assistance as can be furnished to them by those who have made a study of such matters, whether a particular writing is to be assigned to a particular person.”

I would refer also to a passage from the summing-up of Lord Hewart in the trial of William Henry Podmore (I quote from the Famous Trials Series as the only source available to me), when he said:

“Let me say a word about handwriting experts. Let everyone be treated with proper respect, but the evidence of handwriting experts is sometimes rather misunderstood. A handwriting expert is not a person who tells you, this is the handwriting of such and such a man. He is a person who, habituated to the examination of handwriting, practised in the task of making minute examination of handwriting, directs the attention of others to things which he suggests are similarities. That, and no more than that, is his legitimate province.”

The summing-up received the express approval of the Court of Criminal Appeal in *R. v. Podmore* (2).

I would say at once that in my opinion the expert witness was at fault in two respects. In the first place, he merely referred generally to his methods but did not explain to the court the particular features of similarity or dissimilarity, so

enabling the court to weigh their relative significance. Consequently, his evidence was of no assistance to the magistrate when he examined the specimens of handwriting. Secondly, I think, with respect, that in saying that he had no doubt that the forged signature had been written by the appellant, he was going far beyond the proper limits. I think the true answer was given by the expert in the *Bishop of Lincoln* case (1), that “it is not possible to say definitely that anybody wrote a particular thing”. I think an expert can properly say, in an appropriate case, that he does not believe a particular writing was by a particular person. On the positive side, however, the most he could ever say is that two writings are so similar as to be indistinguishable and he could, of course, comment on unusual features which make similarity the more remarkable. But that falls far short of saying that they were written by the same hand.

I think the expert witness, and possibly also the learned magistrate, may have fallen into the error of treating handwriting evidence on the same footing as fingerprint evidence. There is a presumption that no two persons have identical fingerprints, but there is no presumption that no two persons have similar handwritings.

In the present case, there was nothing particularly remarkable about the handwriting in question, nor were there any other factors, such as mis-spelling, which might have helped to link the forged document with the appellant.

In brief the evidence shows that the appellant had the opportunity to commit the offences charged and the forged signature might have been written by him. In my opinion, that falls far short of proving beyond reasonable doubt that the appellant was in fact the person who made the forgery. There was no evidence whatever that he was guilty of the uttering or the stealing, those being presumed to have followed the forgery. This presumption was quite unwarranted. Those were distinct offences and had to be proved.

The conviction of the appellant is quashed and the sentences set aside. He is to be released immediately, unless lawfully held on any other charge.

Appeal allowed. Convictions quashed and sentences set aside.

The appellant in person.

For the respondent:

Director of Public Prosecutions, Tanganyika

A. M. Troup (Senior State Attorney, Tanganyika)

Lawi Ongweya v Republic
[1964] 1 EA 129 (HCT)

Division:	High Court of Tanganyika at Dar-es-Salaam
Date of judgment:	6 November 1963
Case Number:	625/1963
Before:	Sir Ralph Windham CJ
Sourced by:	LawAfrica

[1] *Criminal law – Evidence – Rape – Corroboration – Circumstantial evidence to corroborate complainant's evidence.*

Editor's Summary

The appellant was charged with rape and the complainant's evidence was that while she was walking from her village to a neighbouring village she was set upon by the appellant and that he had sexual intercourse with her several times; that she immediately complained of the rape to more than one person giving a description of the appellant's outward appearance and clothing. There was medical evidence of bruising of the complainant on the thighs and legs and other evidence that when she complained to her sister she was trembling and had grass in her hair. The complainant also told a detective that the appellant had a scar on the inside of his left thigh. After the arrest of the appellant, he was identified by the complainant and a scar as described by her was found on his thigh. The magistrate held that he could find no corroboration, in the strict sense of the word, of the complainant's story as implicating the appellant and then, having warned himself of danger of convicting on the uncorroborated evidence of the complainant, convicted the appellant on the ground that he was convinced of the truth of her story. On appeal,

Held –

- (i) the fact that the complainant correctly described the appellant's outward appearance and clothing was no corroboration of her evidence that he was her assailant, but her knowledge that he had a scar on the inside of his left thigh was a circumstance corroborative of her assertion that it was he who had sexually assaulted her, and wholly incompatible with the assertion of the appellant, who was an admitted stranger to her, that "he knew nothing about her";
- (ii) there was thus corroboration of the complainant's evidence not only that her assailant had intercourse with her against her will, but also that her assailant was the appellant.

Appeal dismissed.

Cases referred to in judgment:

- (1) *Zielinski v. R.*, [1950] 2 All E.R. 1114; 34 Cr. App. Rep. 193.
- (2) *Redpath v. R.* (1962), 46 Cr. App. Rep. 319.
- (3) *R. v. Cherop A. Kinei* (1936), 4 E.A.C.A. 124.
- (4) *R. v. Kirimunyo* (1943), 10 E.A.C.A. 64.
- (5) *Njuguna Wangurimu v. R.* (1953), 20 E.A.C.A. 196.
- (6) *R. v. Omar bin Khamis* (1956), 8 Z.L.R. 374.

Judgment

Sir Ralph Windham, CJ: The appellant was convicted of rape, and was sentenced to twelve months' imprisonment. The complainant, a woman of some forty years of age, testified that while she was walking from her village to a neighbouring village at about 6.30 a.m., to visit her brother, she was set

upon by the accused, who thereupon had sexual intercourse with her several times. At first she resisted and struggled, but when he threatened her

with a knife she ceased to resist, though at no time did she consent willingly. At length the appellant fell asleep, whereupon the complainant ran away and immediately complained of the rape to more than one person, giving a description of the appellant which later led to his arrest. The appellant in evidence denied having had sexual intercourse with the complainant, and added – “In fact I know nothing about this woman”. The complainant was medically examined on the following day, when no vaginal injuries were found, the medical evidence being that such injuries would not be expected in a woman of the complainant’s age. The evidence on this point was unsatisfactory and self-contradictory, as the learned trial magistrate rightly observed. But the medical witness did clearly establish that the complainant had four bruises, on the thighs and the left leg and knee, such as would have been caused if she had struggled to avoid being raped. This evidence, coupled with that of the complainant’s sister, P.W. 5, to whom the complainant ran naked and made an immediate complaint, and who said that the complainant came “trembling and had grass in her hair”, was sufficient corroboration, in my view, that, whoever may have been the complainant’s assailant, he had intercourse with her by force and not with her consent, bearing in mind the English decisions as to the corroboration to be afforded by a complainant’s demeanour and appearance when making an early complaint, in *Zielinski v. R.* (1) and *Redpath v. R.* (2). As to whether, however, these complaints of the complainant afforded corroboration, in the true sense, of her evidence that her assailant was the appellant, the learned trial magistrate rightly held that they did not, if considered by themselves, but that they merely showed consistency. In brief the learned magistrate, who was at some disadvantage by reason of not having available to him the full English or East African law reports on the subject, stated that he could find no corroboration, in the strict sense of the word, of the complainant’s story as implicating the appellant; but he then went on to warn himself of the danger of convicting on the uncorroborated evidence of a complainant in a sexual offence, and thereupon to express himself convinced of the truth of this complainant’s story after paying attention to that warning, and to convict the appellant upon it although in his view it was uncorroborated.

Such a course had the express approval of the Court of Appeal for Eastern Africa in *R. v. Cherop A. Kinei* (3), where it was held that a court was entitled to convict on the uncorroborated evidence of a complainant after so warning itself. But since then, the Court of Appeal, apparently ignoring that decision, has resiled from the position which it there took up and has consistently held that in sexual cases they will *require* corroboration notwithstanding such warning. I need only refer to two of its many decisions on this point, namely *R. v. Kirimunyo* (3) and *Njuguna Wangurimu v. R.* (4), and, if I may, to my own comments on the latter decision, in *R. v. Omar bin Khamis* (5), as touching the question – “What is a rule of law?”

The conviction of the appellant cannot therefore be supported unless the record discloses that there was in fact evidence, either direct or circumstantial, and either expressly accepted by the court or uncontradicted, going to corroborate the complainant’s story that it was the appellant who was her ravisher.

Now when the complainant complained of having been raped, very soon after making her escape, she described the clothes that her assailant had been wearing and said that he was tall and wore a beard. Very shortly afterwards, guided by her description, the police arrested the appellant, whose clothes and appearance were as described. Strictly speaking, the fact that the complainant described the appellant’s outward appearance and clothing correctly cannot be held to corroborate her evidence that he was her assailant. For she might, for some unknown reason, have seen the appellant innocently walking in her vicinity and decided falsely to incriminate him by giving a description of his personal appearance and clothing and saying that a man of that description had raped her.

And she could have done this after no more than a casual glance at him. But there was one peculiarity by which she described him which afforded, in my view, true circumstantial corroboration of her allegations against him; and that was her description of him to the detective sergeant P.W.7, in the evening of the day of the rape, as having had a scar on the inside of his left thigh. Now it was common ground that the appellant, a fish vendor, was a stranger in the vicinity of Manga, having on his own admission come there on foot from his own village a long distance away to “look for business prospects”. He and the complainant had never met before. And yet, after her first meeting with him, she was able to describe a mark upon his body which she could not have seen unless he had been very close to her with his trousers off. For P.W.7 stated, and his statement stood uncontradicted, that it was at 6.40 p.m. that the complainant described her assailant to him as having had such a scar, that it was at 8 p.m. that he arrested the appellant on the basis of her description of his clothes and appearance, and that it was only after this that the complainant identified him, at the police station, when his trousers were pulled down and a scar was found on the inside of his thigh as described by her. Her other descriptions of him she could have given after having merely seen him. But this one, she could not have given unless he had in fact been close to her in state of undress. In short, her knowledge that he had such a scar was a circumstance corroborative of her assertion that it was he who had sexually assaulted her, and wholly incompatible with the assertion of the appellant, who was an admitted stranger to her, that he “knew nothing about her”.

I accordingly hold that there was corroboration of the complainant’s evidence not only that her assailant had intercourse with her against her will, with which point I have dealt earlier, but also that her assailant was the appellant. For this reason, and because the learned trial magistrate expressed himself as being “satisfied beyond doubt of the truth of the complainant’s evidence”, I consider that the conviction can safely and legally stand, and I dismiss the appeal.

Appeal dismissed.

The appellant did not appear and was not represented.

For the respondent:

Director of Public Prosecutions, Tanganyika

K. R. Tampi (State Attorney, Tanganyika)

Sir George Arnautoglu v Income Tax Commissioner

[1964] 1 EA 132 (CAD)

Division:	Court of Appeal at Dar-es-Salaam
Date of judgment:	21 December 1963
Case Number:	80/1963
Before:	Sir Ronald Sinclair P, Sir Trevor Gould VP and Crawshaw JA
Sourced by:	LawAfrica
Appeal from:	High Court of Tanganyika – Biron, J.

[1] Income Tax – Assessment – Beneficial ownership of shares – Agreement to sell shares – Shares transferred to bank as vendor's nominee pending payment of price – Bank as nominee of vendor until payment – Deemed distribution of profits – Vendor assessed in respect of shares held by bank – Liability of vendor to tax.

Editor's Summary

In 1953 the appellant agreed by correspondence to sell to C. (Pty.) Limited 40,000 shares in A. Estates Limited cum dividend. It was agreed that the price should be paid within a year and that pending payment the shares should be transferred to and held by S.A. Bank of Athens, Johannesburg, as the appellant's nominees. This was completed on June 30, 1953, when the shares were registered in the Bank's name. Before the year had expired a dividend on the shares was paid to the Bank but the intending purchaser was unable to find the price agreed. In the meantime the respondent had made an order under s. 22 of the East African Income Tax (Management) Act, 1952, whereby part of the undistributed profits of A. Estates Limited were deemed to be distributed to the shareholders on June 30, 1953. The amount deemed undistributed in respect of the shares in the name of the Bank was £23,705 and by an amended assessment the appellant was assessed to tax thereon for the year of income 1953. The appellant appealed against the assessment and the High Court, in upholding it, held that although the appellant had divested himself of the legal interest in the shares, he had retained the beneficial interest within the meaning of s. 22(11) of the Act and that the bank was a trustee of the shares at the material date within the meaning of the same subsection. On appeal counsel for the appellant submitted that, accepting for this part of the argument that the bank held the shares on behalf of or at the direction of the appellant, the bank was a nominee only, that a nominee was something less than a trustee and could be only an agent, and that the word "trustee" appearing in s. 22(11) must be strictly construed and not extended to include a nominee. He further submitted that the true nature of the transaction was that it was an option to purchase and that there was no legal obligation upon C. (Pty.) Ltd. to complete the purchase, but it was common ground that the bank was the legal owner on behalf of the appellant of the shares and the dividend, and that no beneficial interest became at any time vested in C. (Pty.) Ltd.

Held – the High Court was correct in holding that at the material date the bank was a trustee and the appellant was the beneficial owner of the shares.

Appeal dismissed.

Cases referred to in judgment:

- (1) *Bell v. Income Tax Comr.*, [1960] E.A. 224 (C.A.).
- (2) *Cape Brandy Syndicate v. Inland Revenue Comrs.*, [1921] 1 K.B. 64.
- (3) *Canadian Eagle Oil Co. Ltd. v. R.*, [1946] A.C. 119; [1945] 2 All E.R. 499.
- (4) *Re Marshall's Will Trusts*, [1945] 1 Ch. 217; [1945] 1 All E.R. 550.
- (5) *Burdick v. Garrick* (1870), 5 Ch. App. 233.

(6) *Lyell v. Kennedy* (1889), 14 App. Cas. 437.

(7) *Henry v. Hammond*, [1913] 2 K.B. 515.

The following judgments were read:

Judgment

Sir Trevor Gould VP: This is an appeal from a judgment and decree of the High Court of Tanganyika at Dar-es-Salaam upholding an assessment to income tax made by the respondent against the appellant in respect of a sum of £23,705.

The whole matter at issue arises from a transaction in the year 1953 between the appellant and Campouroglou (Pty) Ltd. of Johannesburg in relation to 40,000 shares in Arnautoglu Estates Limited. The only evidence of the transaction which was accepted as material in the High Court was that contained in correspondence which is set out hereunder. Put quite briefly and in neutral phraseology the transaction was one by which, if it was fully implemented, 40,000 shares in Arnautoglu Estates Limited would be sold by the appellant to Campouroglou (Pty) Ltd.; the intending purchaser was to have one year to pay the price of £40,000 and, pending payment of the price, the shares were to be transferred by the appellant to the South African Bank of Athens Limited (hereinafter called “the bank”). It will be convenient now to reproduce the portion of the High Court judgment in which the correspondence is set out:

“The first letter is from Mr. Campouroglou to the appellant dated the 21st December, 1952 (Appendix 1). This reads:

‘19, 12th Avenue,
Lower Houghton,
Johannesburg.
21.12.52.

My dear George:

You have spoken to me sometime ago about your company in Tanganyika in that you would like to dispose of part of your shares to third parties, and as at present shares of sisal companies pay satisfactory dividends, is it possible that you would like to sell some of your shares and if so on what terms? There is a company here which is known to me and which shows some interest, but I feel they will want some time to pay for the shares as they have tied up capital for the time being in other business.

If you are still interested in disposing of some of your shares, please send me a balance sheet of your company and more particulars.

Many regards from . . . etc.

Yours,
(sd). Phedon
(Ph. Compouroglou)’

Apparently in reply to this letter, the appellant wrote (Appendix 2):

‘Dar es Salaam
February, 1953.

Dear Phedon:

I have not answered your letter earlier, but I have considered your proposal and I am prepared to dispose 40,000 shares in Arnautoglu Estates Ltd. @ £1. The Company's capital was originally £100,000 but it has been

increased to £300,000 by issue of bonus shares. The shares which I would like to dispose are part of the share capital of £300,000 – to make the position clear. I enclose copy of balance sheet of 1951. In August, 1952, the capital was increased to £300,000, as I mentioned above, by capitalisation of £100,000 from profits, but there are profits still available of £150,000.

As I want to make a start to dispose of some shares now that the profits are satisfactory and to convert my company gradually to “Public”, and as I plan to go away in a few months, I am prepared to assign 40,000 in the name of Bank of Athens, Johannesburg, with instructions to transfer the shares to the buyer on payment of £40,000. Meantime, whatever dividends accrue they will be received by the buyer. Payment for the shares to be made within one year at least from date of assignment to the Bank. However, if the buyer prefers, the shares could be transferred to the bank as nominees, so that a second transfer duty is avoided.

If the company which you say is known to you, is agreeable to the above terms, please write to me in order to make the necessary arrangements through the Bank.

(Sd). G. N. Arnautoglu’

This was followed by Appendix 3, a letter dated the 29th April, 1953, from Mr. Campouroglou to the appellant, which reads:

‘19, 12th Avenue,
Lower Houghton,
Johannesburg.
29th April, 1953.

My dear George,

I have finally arranged with Campouroglou (pty) Ltd. to purchase 40,000 shares in Arnautoglu Estates Ltd., Tanganyika, which you are prepared to dispose of at £1 (nominal value) and to make available all future dividends (including any dividends which may arise in respect of your company’s profits) as from 1953.

The arrangement is that you will transfer the shares as soon as possible to the South African Bank of Athens Ltd., as your nominees together with all dividends as above-mentioned. The company (Campouroglou (pty) Ltd.) will have the right to pay for the shares within one year from the date of transfer from yourself to the Bank and to pay you £40,000 in South Africa.

I have explained to the company the good profits sisal estates are making in Tanganyika and I shall bear in mind your intention to dispose of gradually more shares so that your company may be converted in due course of time to a Public Company. At first opportunity I will see that more shares are bought of you.

It might be possible that the Bank will agree to continue acting as agents (nominees) for the buyers until the shares are paid, to avoid double transfer duties. This, in any case, suits the purchasers as for the time being they would prefer that the shares are not in the name of their company.

Please let me know as soon as the transfer in favour of the Bank has taken place.

Many regards from . . . etc.

Yours

(sd.) Phedon

(Ph. Campouroglou)’

One of the two copy letters produced at the hearing which is extremely relevant, is from the appellant to the Bank. It is dated 26th May, 1953, and reads:

‘Dar es Salaam,
26th May, 1953.

The Managing Director,
S. A. Bank of Athens Ltd.,
116 Marshall Street,
Johannesburg.

Dear Sir,

With reference to the conversation I had with your Mr. Zenghelis and for the purpose of facilitating the disposal of certain shares in my company here, I enclose Transfer (in duplicate) of 40,000 Shares in Arnautoglu Estates Ltd. and I shall be glad if this may be signed by the Bank’s nominees and returned to me when I will arrange with the Secretary of the Company that a Share Certificate for the 40,000 shares is sent to the Bank. The duplicate of the Transfer may be retained by you pending the receipt of the Share Certificate.

The Transfer will attract Tanganyika Stamp Duty and this will be paid by me when the Transfer is returned by you. I will claim this in due course from the party to whom the shares will finally be disposed of. If there is stamp duty on the same transfer payable in South Africa, I shall be glad if you will have this paid for my account together with any other dues or fees as may be necessary.

It is possible that the party who will take up the shares eventually, will continue to employ the Bank as his nominees, so as to avoid double transfer fees, but I shall be glad if the Bank will confirm to me that, until then, the shares shall be held for my account and in case of retransfer to me no consideration will be paid to the Bank.

I understand that if dividends are remitted to South Africa they will attract S.A. Income Tax, and not otherwise. Please confirm.

May I request that the Transfer be returned to me without delay as I will be leaving for overseas on 2nd June. If, however, there would be some delay, kindly return the transfer to Mr. D. I. Odysseos (same address as mine) who will be my attorney during my absence. You will receive in due course a copy of the Memorandum & Articles of Association of Arnautoglu Estates Ltd.

Yours faithfully,
(sd.) (G. N. Arnautoglu)’

The agreement between the parties was never implemented. The failure to implement the agreement was conveyed to the appellant by Mr. Campouroglou in a letter dated the 7th May, 1954. A translation of the whole letter was produced at the hearing. It is not, however, necessary to set out the whole of the letter. The relevant extract appears in the appellant’s statements of facts as Appendix 7 and reads as follows:

‘A few days ago, I have been informed by Zenghelis that £1,500 have been received being dividend of the £40,000 shares in Arnotauglu Estates Ltd. I am very sorry that this matter has not been finalised, as the funds we were expecting to receive for the payment of the shares have not been forthcoming up to now and I hope that you will not hold me responsible. I have tried my very best, but we have here “tightness” of money and it has not been possible to get in monies.’

The other copy letter produced at the hearing on behalf of the appellant is from the South African Bank of Athens Ltd. to the appellant, dated 27th April, 1956, and reads:

‘116 Marshall Street,
Johannesburg.
27th April, 1956.

G. N. Arnautoglu, Esq.,
Royal Consulate for Greece,
P. O. Box 766,
Dar es Salaam.
Dear Sir,

Re: 40,000 shares in Arnautoglu Estates Ltd.

With reference to your letter dated 20th inst. we confirm that, to this date, no payment has been made to us, in compliance with your arrangements as per your said letter, for the disposal of the above-mentioned shares and of the dividend of £1,500. Consequently we still hold as your nominees the shares in question and on your account the proceeds of the dividend. We now await your further instructions.

Always pleased to be at your disposal.

Yours faithfully,
The South African Bank of Athens Ltd.
(sd.) ‘

There is some further correspondence, which is not so strictly relevant as it was written much later, but as both parties have referred to it and in varying degrees rely on it, it is therefore necessary to set it out as well. The first of these letters is from the South African Bank of Athens Ltd. to the respondent, dated 5th September, 1961 (Appendix 17 in the appellant’s statement of facts), which reads:

‘116 Marshall Street,
Johannesburg.
5th September, 1961.

The Assistant Commissioner,
East African Income Tax Department,
P.O. Box 9131,
Dar es Salaam.
Dear Sir,

Re: Sir George Arnautoglu – Arnautoglu Estates Ltd.

We are in receipt of your letter of the 16th August, for which we thank you.

In reply to your request we wish to advise that during May, 1953, an arrangement was made for 40,000 Arnautoglu Estates Limited Shares to be registered in the name of our Bank’s Nominees and held on behalf of Sir George Arnautoglu, to facilitate their disposal to another party.

According to assurance given to us by Mr. D. E. Zenghelis, Managing Director at that time, the Shares were to have been purchased “cum div” by Campouroglu Limited, Johannesburg.

The Transfer forms (in duplicate) for registration of the shares into our Nominees names were received at the end of May, 1953, completed by ourselves and returned. Share Certificate(s) No. 11 for 40,000 Shares

dated 29th June, 1953, was received by us at the beginning of September, 1953.

We were instructed by Sir George Arnaoutoglu to deliver the shares to the person to whom they were to be sold against payment and that any dividend paid by Arnaoutoglu Estates Limited were to be held by the Bank for payment to the buyer should the arrangement between Sir George Arnaoutoglu and the buyer be implemented. A "cum div" sale of the said shares was therefore envisaged.

However, the arrangement was not implemented and the shares reverted back to Sir George Arnaoutoglu.

Any further information that you may need, will be furnished upon request.

Yours faithfully,

The South African Bank of Athens Ltd.

(sd.) ‘

The next is Appendix 18, also in the appellant's statement of facts, a letter from Mr. D. Zenghelis, one of the nominees of the Bank to whom the shares were transferred, dated 7th July, 1962 and addressed to the appellant:

‘22 Ipirou Street,

Athens – Greece.

7th July, 1962.

Sir George Arnaoutoglu, K.B.E.,

P.O. Box 766,

Dar es Salaam,

Tanganyika.

Dear Sir George,

I refer to the 40,000 shares in Arnaoutoglu Estates Ltd. which you transferred to me and Mr. Lescaris in May, 1953, as nominees for the South African Bank of Athens, Ltd., Johannesburg.

You had originally executed a transfer for the said shares in the name of the Bank, but upon the Bank informing you that they have no nominee company, you made out a fresh transfer in the name of D. Zenghelis and A. Lescaris.

I confirm that as one of the transferees of the said shares you acquainted me with the arrangement you had made early in April, 1953 with Mr. Ph. Campouroglu, on behalf of Campouroglu Limited, Johannesburg, for the sale to this company of the said shares "cum div". I was instructed to pay out to Campouroglu Limited any dividends which would have accrued to the said shares, after the date of the transfer to me and Mr. Lescaris, and which dividends would have been deposited in the first place with the South African Bank of Athens, Limited.

I am also in a position to confirm that myself as well as Mr. Lescaris were bound, in accordance with your instructions, to treat the shares as having been purchased absolutely by Campouroglu Limited but we were to effect the transfer to them on receipt by the Bank of the sum of £40,000 which was the agreed price between yourself and Mr. Ph. Campouroglu on behalf of his company. At the same time any dividends in the hands of the Bank from the same shares were to be paid over to the said buyers, as per your agreement with them.

Yours sincerely,

(sd.) D. Zenghelis”

The agreement of Campourogrou (Pty) Ltd. to the transaction is contained in the letter dated April 29, 1953. The transfer of the shares to the Bank was signed on or about May 26, 1953, and it was common ground that it was duly approved by Arnautoglu Estates Limited on June 1, 1953, and on June 29, 1953, it was registered in the company's share register. The transaction came to an end on May 7, 1954, as appears from the passage above quoted from the letter of that date, but on March 22, 1954, an actual dividend of £1,500 had been declared in respect of the shares.

By an order dated June 4, 1953, issued under s. 22 of the East African Income Tax (Management) Act, 1952, the respondent notified Arnautoglu Estates Limited that an amount of Shs. 3,386,532 of the undistributed profits of the company for the period ending December 31, 1952, had been deemed to have been distributed to the shareholders of the company on June 30, 1953. The amount deemed distributed in respect of the shares in the name of the Bank was £23,705 and by an amended assessment the appellant was assessed to tax in respect of this sum, in respect of the year of income, 1953.

The power of the respondent to order a deemed distribution of the income of a company was at the relevant time contained in sub-s. (1) of s. 22 of the 1952 Act, and the power relied upon to assess the appellant, although the Bank was the registered shareholder, is in sub-s. (11) of that section. Subsection (3) has also been referred to in argument and the three subsections read as follows:

“22(1) Where the Commissioner is satisfied that, in respect of any period for which the accounts of a company resident in the Territories have been made up, the amounts distributed as dividends by that company up to the end of the twelve months after the date to which such accounts have been made up, increased by any tax payable thereon, are less than sixty per cent, of the total income of the company ascertained in accordance with the provisions of this Act for that period, he may, unless he is satisfied that having regard to losses previously incurred by the company or to the smallness of the profits made the payment of a dividend or a larger dividend than that declared would be unreasonable, by notice in writing order that the undistributed portion of sixty per cent. of such total income of the company for that period shall be deemed to have been distributed as dividends amongst the shareholders as at the end of the sixth month after the date to which such accounts have been made up and thereupon the proportionate share thereof of each share-holder shall be included in the total income of such shareholder for the purposes of this Act:

Provided that when the reserves representing accumulations of past profits which have not been the subject of an order under this section exceed the paid-up capital of the company together with any loan capital which is the property of the share-holders, or the actual cost of the fixed assets of the company, whichever of these is greater, this subsection shall apply as if instead of the words ‘sixty per cent.’ the words ‘one hundred per cent.’ were substituted.

(3) Where any shares are held by any person who is a relative of, or who is a nominee of, or who is a partner of, or who is a trustee for, any other person and such other person is not a member of the public within the meaning of this section, then such shares shall, for the purpose of determining whether the company is or is not one in which the public is substantially interested, be treated as if they were held by such other person; and for the purposes of this section:

(a) the expression ‘relative’ means a husband, wife, ancestor, lineal descendant, step-child, adopted child, illegitimate child, brother or sister;

- (b) a person shall be deemed to be the nominee of another person, if, whether directly or indirectly, he possesses on behalf of that other person, or may be required to exercise on the direction of or on behalf of that other person, any right or power which, by virtue of any of the provisions of this Act, is material in determining whether a company is or is not to be deemed to be one in which the public are substantially interested.
- (11) Where a trustee is a shareholder deemed under subsection (1) to have received a dividend, then the Commissioner may, by notice in writing, require the trustee to furnish the name and address of each person having any beneficial interest in the shares held by such trustee; and thereupon the Commissioner may apportion the dividends deemed to have been received in respect of such shares among such persons in accordance with such beneficial interest and such apportioned amounts shall be included in the total income of each such person for the purposes of this Act and the tax thereon may be recovered in accordance with the provisions of subsection (4)."

The learned judge in the High Court made two findings, both of which are challenged in this appeal. First he found that the appellant divested himself of the legal interest in the shares but retained the beneficial interest; he was thus a person having a beneficial interest within the meaning of s. 22(11). Secondly he held that the Bank was a trustee of the shares at the material date within the meaning of the same subsection. He accordingly upheld the assessment on the appellant.

In the view of counsel for the appellant the paramount question relates to the second of these findings and is whether the Bank was a trustee within the meaning of sub-s. (11). As I understand him, he accepted for the purpose of this part of the argument that the Bank held the shares on behalf of or at the direction of the appellant. The submission is that the Bank was a nominee only, as described in the correspondence, that a nominee is something less than a trustee and may be only an agent and that the word "trustee" appearing in sub-s. (11), must be strictly construed and not extended to include a nominee. Further argument was based on the position of banks in general and of the Bank in particular.

The aspect of the argument which is based upon the construction of the Act and the position of the Bank can be dealt with at once. The question whether the Bank was in fact and law a trustee is bound up with the question whether the appellant was a beneficiary and must be postponed pending an examination of the details of the transaction.

Counsel for the appellant, in his argument on the construction of the Act, relied upon principles applicable to the construction of a taxing measure, which were considered and applied by this court in *T. M. Bell v. Commissioner of Income Tax* (1). The case was concerned, as is the present case, with the construction of sub-s. (11) of s. 22, but with the meaning of the word "share-holder" appearing therein, and not the word "trustee". So far as the actual decision is concerned the case is of no assistance and it serves only the useful purpose of gathering together a number of expressions of judicial opinion of high authority on the principles involved. A number of these quotations have been set out in the judgment under appeal and it will be sufficient for my purpose to say that in taxation legislation it is the letter of the law that is paramount and to quote only what was said by Rowlatt J. in *Cape Brandy Syndicate v. Inland Revenue Commissioners* (2) [1921] 1 K.B. 64, at p. 71 and approved by Viscount Simon L.C. in *Canadian Eagle Oil Co. Ltd. v. R.* (3), [1946] A.C. 119 at 140:

"In a taxing Act one has to look merely at what is clearly said. There is

no room for intendment as to tax. Nothing is to be read in, nothing is to be implied. One can only look fairly at the language used.”

It is therefore the duty of the courts to adhere to literal construction unless that is clearly impossible, but I do not see how that helps the appellant in the present case. The respondent is quite prepared to accept and indeed to insist upon the ordinary literal meaning of the word “trustee” in sub-s. (11). By virtue of s. 2(1) of the Land (Law of Property and Conveyancing) Ordinance (Cap. 114 Tanganyika Revised Laws) the law of England relating to (*inter alia*) real and personal property and trusts and trustees as at January 1, 1922, is in force in Tanganyika subject to certain limitations which are not material in the instant case. No definition of “trust” or “trustee” appears in the Act and I reproduce the following from Underhill’s Law of Trusts and Trustees (11th Edn.) 3:

“A trust is an equitable obligation, binding a person (who is called a trustee) to deal with property over which he has control (which is called the trust property), for the benefit of persons (who are called the beneficiaries or *cestuis que trust*), of whom he may himself be one, and any one of whom may enforce the obligation.”

That definition was approved by Cohen J. in *In re Marshall’s Will Trusts* (4), [1945] 1 Ch. 217 at p. 219, though, as counsel for the appellant points out, it was adopted for the purposes of the particular case. It may be that the concept of a trust is one which is very difficult of precise and comprehensive definition, but I think it can be said that other definitions are at least no narrower than that in Underhill.

It has been contended for the appellant that a restricted meaning should be given to the word “trustee” in sub-s. (11) for the reason that in sub-s. (3) it is used in conjunction with “nominee”, “relative” and “partner”. Counsel has submitted that “nominee” and “trustee” are exclusive terms and that there is no case in which a nominee has been held to be a trustee. Certainly the other terms used in sub-s. (3) are not mutually exclusive. A partner can be a relative, a trustee or a nominee as well. Speaking generally I would say that the term “nominee” is one of wide meaning denoting a person named or nominated for a purpose which can only be determined by the context; a person can be named or nominated as a trustee as well as for any other purpose. But in sub-s. (3) it is stated when a person is “deemed” to be a nominee of another. The subsection in the context of the whole section is concerned primarily with voting power and the definition of nominee casts a wide net over many who hold such powers on behalf of others. Agency in its various forms would perhaps predominate but I think it quite possible that certain forms of trusteeship would be included, e.g. a bare trusteeship where the beneficiary would have the right to control the exercise of the voting power. Something of that idea is expressed in a definition which I have taken from the Exchange Control Act, 1947 (Imperial) s. 20(5)(b):

“a person shall not be deemed to hold a security or coupon as a nominee by reason only that he holds it as a trustee if he is entitled to transfer the security or coupon without permission from any other person.”

For the purposes of that Act obviously a person can be a trustee and a nominee in respect of a security at the same time if he must look to another for permission to deal with it.

On the assumption then that some who are trustees could be deemed nominees, is that a valid reason for regarding the meaning of “trustee” as limited to those

trustees who were not deemed nominees? As I have indicated, the other categories named are not mutually exclusive. Having regard to the object of the subsection, what would it matter if a particular person fell within a number of categories? As to the absence of legal decision on the matter, whom would it profit to litigate the question of nominee or trustee for the purposes of s. 22(3) when a person is clearly one or the other? I see no reason to put any limitation upon the meaning of the word “trustee” by reason of the context in sub-s. (3) and consequently none in sub-s. (11) either. To argue, as I think counsel for the appellant was finally constrained to do, that in the latter the meaning was restricted to express trusts is, I think, to contravene the very principle of literal construction emphasized in *T. M. Bell v. Commissioner of Income Tax* (1) upon which the appellant relies, by assigning to a term a meaning narrower than the usually accepted meaning where no such narrowing is essential by reason of the context of either of the relevant subsections or the section or Act as a whole.

I refer now to the argument based upon the position of banks in general. It is said that banks carry on various types of business for reward; the question of banker’s lien over funds and property they hold is a complex one; usually a bank has quite a separate department to deal with trusteeship matters quite distinct from its commercial activities; the relationship of banker and customer is not that of trustee and beneficiary. The argument in relation to the Bank, as a particular bank, is that, so far as is known it operates in South Africa and has certain Greek associations; it is not known whether its constitution empowers it to act as trustee; it is situated out of the jurisdiction and s. 22(11) containing as it does, power to serve a notice upon a trustee, should be read as being limited to a trustee within the jurisdiction.

I must confess to being rather uncertain as to the direction which these arguments are intended to take. I do not think they can be intended to refer to the construction of “trustee” in s. 22(11). The word is there used quite generally and it is merely to state the obvious to say, it being conceded that a bank can be a trustee, that banks fall within the subsection when they assume that position. On the other hand insofar as the arguments are directed to whether the Bank in particular did or would be likely to accept the office of trustee in the instant case I do not find that they are of weight. As to the absence of evidence showing that the Bank’s constitution permits it to be a trustee, this is certainly a position in which the maxim “*omnia praesumuntur rite et solemniter esse acta*” would operate in favour of the respondent. The appellant cannot be heard to say with any effect that he transferred shares to the Bank as trustee but it may be that the Bank could not validly be a trustee. The same applies to the question of remuneration, upon which there is no evidence. The fact that in relation to current and deposit accounts of a customer a bank is not a trustee has no relevance in view of the accepted fact that a bank can be a trustee in other matters. I cannot accept that the operation of s. 22(11) is restricted to trustees within the jurisdiction: if it were so there would be a wide gap in the legislation though I do not think that consideration has any substantial weight in a question of construction. The respondent seeks to tax a beneficiary within the jurisdiction in relation to income arising within the jurisdiction. What remedy he might have if a trustee outside the jurisdiction failed to comply with a notice under s. 22(11) is quite another question and not here material.

The important question now is what was the effect of the transaction entered into between the parties in or about April, 1953. As between the appellant and Campourolou (Pty) Ltd. the position taken by counsel for the appellant was that there was a conditional sale or an agreement for sale; he quoted by way of analogy s. 3(3) of the Sale of Goods Ordinance (Cap. 214, Laws of Tanganyika). If, by that argument, counsel meant that the property in the shares was (as between vendor and purchaser) to pass at a future date I cannot

see how it helps the appellant's case. Shares do not, of course, fall within the definition of goods in the Sale of Goods Ordinance which is not therefore directly applicable. Counsel for the respondent submitted that the true nature of the transaction was that it was an option to purchase and that there was no legal obligation upon Campouroglou (Pty) Ltd. to complete the purchase.

I do not think the resolution of that question is of high importance and the learned judge in the High Court preferred "not to attempt to affix any specific label" to the transaction. On a very close balance of probabilities my own opinion is that each of the parties did intend to bind himself to the sale and purchase. Otherwise one would have expected the term "option" which is a well known term, at least in the English language (I am not acquainted with Greek) to have been used somewhere in the correspondence. The sentence in the appellant's letter of February, 1953: "Payment for the shares to be made within one year at least from the date of assignment to the Bank" seems to me more appropriate to an offer of sale than to an offer of an option. The corresponding sentence in the letter of acceptance of April 29, 1953, is:

"The company (Campouroglou (pty) Ltd.) will have the right to pay for the shares within one year from the date of transfer from yourself to the Bank and to pay you £40,000 in South Africa."

I do not think the word "right" is in the context intended to negative obligation but to confirm that a year is allowed for payment. Some slight support for that appears in the reference to responsibility in the letter of May 7, 1954.

As I have indicated I do not think that question is greatly material, for this is a transaction in which all questions relating to the property in the shares depend upon the intention of the parties as to that property and that can only be gathered from the correspondence and the execution of the transfer of the shares. It is common ground that the legal ownership of the shares was transferred to the Bank and remained with it throughout. One other thing is also, in my opinion, clear from the correspondence and that is that the Bank held the shares and the actual dividend on behalf of the appellant and no beneficial interest became at any time vested in Campouroglou (Pty) Ltd. In the letter of April 29, 1953, from Campouroglou he speaks of the Bank as "your nominees" and the reference to avoidance of double transfer duties in that letter, read with the like references in the letters of February, 1953, and May 26, 1953, indicates with clarity that the intention was that the Bank might be asked to become the purchaser's nominees after payment of the price and not "until" payment as stated in the letter of April 29, 1953. In his letter of May 26, 1953, the appellant requests the Bank to confirm that until the other party has taken up the shares (which can only mean has paid for them) the shares are to be held for his account. The Bank's letter of April 27, 1956 confirms that position and also that the actual dividend was retained on the same terms. The last paragraph of the letter of July 7, 1962, from Zenghelis (one of the Bank's two nominees) indicates that the instructions were to transfer the shares, and at the same time any dividends, to Campouroglou (Pty) Ltd. upon receipt of the agreed price of £40,000.

At the material date therefore, the Bank held the shares for the account of the appellant and it is necessary to determine whether the Bank was a trustee or a mere agent with no fiduciary relationship.

No form of words is necessary for the creation of a trust providing the intention is apparent, and as it is put in Underhill at p. 21:

"but wherever a person vests property in another and shows an intention that it is to be applied for the benefit of third parties who are sufficiently

pointed out, an express trust will be created, whatever form of words may have been used.”

In the present case the property was vested in the Bank, and the beneficiaries were indicated with certainty, i.e. the property was to be held for the appellant until £40,000 was paid within one year and thereafter for the purchaser. It may be asked whether the purchaser in the present case, upon due payment of the purchase price within one year, could have enforced its rights to the shares directly against the Bank as a trustee. I think that is in fact the intention to be gathered from the correspondence. If it were not to give Campouroglou (Pty) Ltd. some form of security that the transaction would be implemented there would be little point in transferring the shares to the Bank at all. By the creation of a trust, which the appellant could not revoke, the shares were set aside and placed beyond his control for the year during which payment could be made. A mere agency could be revoked at any time and would confer no security upon the purchaser, and security would be an advantage to the purchaser whether the transaction was an agreement for sale or an option.

I think the view that trusteeship was the true intention of the parties is supported by two aspects of the correspondence. First that the purchaser contemplated allowing the shares to remain in the Bank’s name after completion, and though the word “nominee” is used the relationship at that stage could only, in my view, be that of trustee and beneficiary. Secondly there is the insistence by the appellant that the shares be held for his account, which indicates an intention to retain the beneficial ownership. It would, in a case of mere agency, be both unnecessary and unusual, for the legal estate in property to be transferred to the agent, when a power of attorney would suffice. It cannot be suggested that there was no severance of legal and beneficial ownership and I have already indicated my opinion that beneficial ownership did not pass to Campouroglou (Pty) Ltd; it therefore remained with the appellant.

Even if it was considered that the Bank was in some respects an agent for the appellant there is authority for the proposition that a fiduciary relationship can co-exist with agency. If the terms of an agency are such that the agent’s duty is to keep the principal’s money separate from all other money then the agent is a trustee. It would seem that the same considerations must apply with even greater force to specific property such as the shares with which this case is concerned. The authorities quoted in 1 Halsbury’s Laws (3rd Edn.) 187 for the proposition I have just enunciated are *Burdick v. Garrick* (5), *Lyell v. Kennedy* (6) and *Henry v. Hammond* (7). In *Burdick’s* case the following passage is taken from the judgment of Giffard, L.J. at p. 243:

“There was a very special power of attorney, under which the agents were authorized to receive and invest, to buy real estate, and otherwise to deal with the property; but under no circumstances could the money be called theirs; under no circumstances had they the least right to apply the money to their own use, or to keep it otherwise than to a distinct and separate account, throughout the whole of the time that this agency lasted the money was the money of Mr. Garrick, and not in any sense theirs. Under these circumstances, I have no hesitation in saying that there was, in the plainest possible terms, a direct trust created between these gentlemen and Mr. Garrick. I do not think that that trust was put an end to when Mr. Garrick died; and I do not hesitate to say that where the duty of persons is to receive property, and to hold it for another, and to keep it until it is called for, they cannot discharge themselves from that trust by appealing to the lapse of time. They can only discharge themselves by handing over that property to somebody entitled to it.”

In the present case, if there was no general duty to receive and hold property there was a specific agreement to do so. As is indicated in *Henry v. Hammond*

(7) the passage quoted has been approved by many judges. Applying the same principle, I think that even if, in transferring the shares to Campourolou (Pty) Ltd. (had that stage been reached) the Bank would have been acting as agent nevertheless it held the property meanwhile on terms of a direct trust for the appellant. For those reasons I think the learned judge in the High Court was correct when he held that at the material date the Bank was a trustee and the appellant the beneficial owner of the shares.

There were two subsidiary points made by counsel for the appellant. One was that the beneficial interest in the shares must relate to the income from the shares. The shares had been sold cum dividend. I think this does not affect the position. I think the actual dividend declared would be as much the subject of a trust as the shares themselves, but, in any event, the assessment is concerned with a deemed dividend. That is only a taxing device and the commissioner is empowered to apportion it among the beneficial owners of the shares. At the material date the beneficial owner was the appellant. The second point is that if the respondent's argument as to the legal position is correct, it must apply even if the transaction had been completed and the shares transferred to Campourolou (Pty) Ltd. I think that submission is correct but it is not material. The question of any adjustment between the parties which might then have arisen is not one with which this court is concerned.

For the reasons I have indicated above I would dismiss the appeal with costs.

Sir Ronald Sinclair P: I agree with the reasoning and conclusions of the learned Vice-President. The appeal is accordingly dismissed with costs.

Crawshaw JA: I also agree.

Appeal dismissed.

For the appellant:

Anagnostaras & Shukla, Dar-es-Salaam

K. Bechgaard, Q.C., and E. D. Anagnostaras

For the respondent

The Legal Secretary, E. A. Common Services Organisation

P. J. Treadwell (Asst. Legal Secretary, E.A. Common Services Organization)

Zanzibar Theatres Ltd v Dyer-Merville and another
[1964] 1 EA 144 (CAD)

Division:	Court of Appeal at Dar-es-Salaam
Date of judgment:	17 December 1963
Case Number:	15/1963
Before:	Sir Ronald Sinclair P, Sir Trevor Gould VP and Crawshaw JA
Sourced by:	LawAfrica
Appeal from:	The High Court of Zanzibar – Horsfall, J.

[1] Appeal – Jurisdiction – Zanzibar – Decision of Rent Restriction Board – Whether further appeal lies from decision of High Court on appeal.

[2] Rent restriction – Appeal – Jurisdiction – Zanzibar – Decision of Rent Restriction Board – Whether appeal lies from decision of the High Court on appeal.

Editor's Summary

A landlord appealed from a decision of the High Court of Zanzibar dismissing his appeal from a decision of the Rent Restriction Board of Zanzibar which had assessed the standard rent of premises occupied respectively by the respondents as tenants. At the hearing of the second appeal counsel for the first respondent took a preliminary objection that a second appeal did not lie. The submission put forward was that s. 76 of the Civil Procedure Decree gave a limited appeal to the Court of Appeal from every decree passed in appeal by the High Court, that as no new 'lis' was initiated when the appeal to the High Court was filed, the decision on appeal had the same status or character as the

decision appealed from, that the decision of the Rent Restriction Board was not a decree but an order, and accordingly the decision of the High Court was also not a decree but an order and, therefore, no further appeal lay from the order of the High Court made on appeal. It was further argued that the right of appeal to the High Court conferred by s. 11 of the Rent Restriction Decree gave the High Court a special jurisdiction, that the decision of the High Court was made in the course of that jurisdiction and not in the course of its ordinary jurisdiction and the ordinary provisions as to appeal from decisions of the High Court did not apply. Counsel for the appellant contended inter alia that Article 37 of the Zanzibar Order in Council 1924 as amended by the Zanzibar Order in Council 1952, conferred a right of appeal to the Court of Appeal from the orders of the High Court.

Held –

- (i) the decision of the Rent Restriction Board was an order and not a decree since it was not made in a suit;
- (ii) in Zanzibar an appeal is not a fresh suit but only a continuation of the proceedings and the decision in appeal, in the absence of any provision to the contrary, has the same status or character as the decision appealed from;
- (iii) since in Zanzibar there is no provision to the contrary, in so far as an appeal from a Rent Restriction Board was concerned, it follows that the decision of the High Court in appeal was not a decree but an order and that no further appeal lay.

Preliminary objection sustained. Appeal dismissed.

[**Editorial Note:** In case the decision upon the preliminary objection was held to be wrong, the court heard the appeal on its merits and came to the conclusion that the appeal ought to be dismissed.]

Cases referred to in judgment:

- (1) *Kassam Ahmed v. Virpal Shah Zazverchand and Another* (1946), 13 E.A.C.A. 35.
- (2) *Gulmohamed Sheikh Noordin v. Sheikh Bros. Ltd.* (1951), 18 E.A.C.A. 42.
- (3) *Singh (Bhagat) v. Chauhan (Ramanlal P.) and Others* (1956), 23 E.A.C.A. 178.
- (4) *Singh (Hem) v. Das (Mahant Basant)* [1936] 1 All E.R. 356.
- (5) *Rangoon Botatoung Co. v. Rangoon Collector* (1912), 39 I.A. 197.
- (6) *National Telephone Co. Ltd. v. Postmaster-General*, [1913] A.C. 546.
- (7) *Secretary of State for India v. Rao (Chelikani Rama)* (1916), 43 I.A. 192.
- (8) *Maung Ba Thaw v. Ma Pin* (1934), 61 I.A. 158.
- (9) *Hansraj v. Dehra Dun-Mussoorie Electric Tramway Co. Ltd.* (1932), 60 I.A. 13.
- (10) *Kamaraju v. Secretary of State for India* (1888), 11 Mad. 309.
- (11) *Secretary of State for India v. Hindustan Co-operate Insurance Society Ltd.* (1931), 58 I.A. 259.
- (12) *Cowasjee Dinshaw v. Cowasjee's Staff Association*, [1961] E.A. 436 (C.A.)
- (13) *Choudrain (Mussumat Durga) v. Choudhri (Jawarhir Singh)* (1890), 17 I.A. 122.

(14) *Essaji (Jafferali) v. Pratap (Laxmibai G.)* [1959] E.A. 1052 (C.A.).

(15) *Patel v. Jiwa (Bhimji) & Sons*, [1960] E.A. 100 (C.A.).

The following judgments were read.

Judgment

Sir Ronald Sinclair P: This is an appeal from a decision of the

High Court of Zanzibar dismissing an appeal by the landlord from a decision of the Rent Restriction Board of Zanzibar assessing the standard rent of those portions of the Majestic Building in Zanzibar occupied respectively by the two respondents as tenants. The second respondent, East African Airways, did not file a notice of address and has taken no part in the appeal.

I shall deal first with the preliminary objection of the first respondent that a second appeal to this court does not lie. Mr. Fraser Murray's argument in support of the objection was, in outline as follows: Section 76 of the Civil Procedure Decree (Cap. 8) gives a limited appeal to this court from every decree passed in appeal by the High Court. No new lis was initiated when the appeal to the High Court was filed and the decision of the High Court on appeal had the same status or character as the decision appealed from. The decision of the Rent Restriction Board was not a decree, but an order, and, accordingly, the decision of the High Court was also not a decree, but an order. No further appeal lies to this court from the order of the High Court made in appeal. It was further argued that the right of appeal to the High Court conferred by s. 11 of the Rent Restriction Decree (Cap. 98) gave the High Court a special jurisdiction, that the decision of the High Court was made in the course of that jurisdiction and not in the course of its ordinary jurisdiction and the ordinary provisions as to appeal from the decisions of the High Court, do not apply. I understood counsel for the first respondent's submission to be that the question whether the decision of the High Court is a decree or an order and the question whether the High Court in such an appeal was exercising special jurisdiction, are interrelated but, for reasons which I shall give, I think they are separate questions.

The formal expression of the decision of the High Court, the subject of this appeal, is entitled "Decree", but, if it is not a decree, mere nomenclature cannot, of course, confer a right of appeal where none exists.

The question whether a second appeal lies from the High Court of Zanzibar in the circumstances existing in the present case has not, it seems, been the subject of a decision by this court, but there have been three decisions in appeals from the Supreme Court of Kenya relating to determinations of Rent Control Boards in Kenya. Those decisions are *Ahmed Kassam v. Shah Zaverchand Virpal and Another* (1), *Sheikh Noordin Gulmohamed v. Sheikh Bros. Ltd.* (2), and *Bhagat Singh v. Ramanlal P. Chauhan and Others* (3).

Before considering those authorities it is necessary to refer to the more important of the relevant provisions of the Rent Restriction Decree and the Civil Procedure Decree. Section 11(1) of the Rent Restriction Decree provides that an appeal shall lie to the High Court from any order, decision or determination of a Rent Restriction Board upon any point of law or of mixed fact and law and sub-s. (4) of the same section empowers the High Court to make rules providing for inter alia, the procedure to be followed in such appeals. Rule 8 of the Rent Restriction Appeals Rules made under s. 11(4) applies Order XLVI of the Civil Procedure Rules to appeals under the Rent Restriction Decree. Order XLVI deals with appeals from original decrees but its provisions are applied also to appeals from orders, "so far as may be" by Order XLVII rule 2. The powers of a Board are set out in ss. 7 and 9 of the Rent Restriction Decree and they include assessment of the standard rent of any premises and the power to make orders for recovery of possession of premises, to administer oaths and to make orders for costs.

I have already referred to s. 76 of the Civil Procedure Decree sub-s. (1) of which provides:

"Save where otherwise expressly provided in the body of this Decree or by any other law for the time being in force, an appeal shall lie to the

Court of Appeal from every decree passed in appeal by the High Court, on any of the following grounds, namely:"

followed by the specified grounds.

Subsection (1) of s. 81 specifies the orders from which an appeal lies and sub-s. (2) provides that no appeal shall lie from any order passed in appeal under that section.

"Decree" is defined in s. 2 of the Civil Procedure Decree as follows (omitting the immaterial portion):

"'Decree' as used in reference to a suit means the formal expression of an adjudication which, so far as regards the court expressing it, conclusively determines the rights of the parties with regard to all or any of the matters in controversy in the suit and may be either preliminary or final or partly preliminary and partly final."

"Suit" is not defined, but "court" and "civil court" are defined as meaning "the High Court and any court subordinate thereto other than a district court established under the provisions of the Courts Decree or the British Subordinate Courts Order" and "order" as meaning "the formal expression of any decision of a civil court which is not a decree."

I turn now to the Kenya cases. In *Ahmed Kassam's* case (1), the Rent Control Board had, under the provisions of the Increase of Rent and of Mortgage Interest (Restrictions) Ordinance, 1940 given permission to a landlord to increase the rent of the premises in dispute. Under the Ordinance an appeal lay either to the Supreme Court or to a first class magistrate. The appellant appealed to a first class magistrate and his appeal was dismissed. He then appealed to the Supreme Court and his appeal was again dismissed. The Supreme Court entertained the appeal by virtue, it seems, of s. 65 of the Civil Procedure Ordinance, which provides that:

"Unless otherwise expressly provided by this Ordinance . . . an appeal shall lie from the decrees or from any part of the decrees and from the orders of all subordinate courts to the Supreme Court."

But s. 75, as it then stood, provided that:

"An appeal shall lie from the following orders, and save as otherwise expressly provided by this Ordinance or by any law for the time being in force, from no other orders."

Section 81 of the Zanzibar Civil Procedure Decree is in substantially the same terms. None of the types of orders specified in s. 75 was relevant in the particular case. There being no other special provision, the magistrate's decision, if an order, was not appealable. In the Kenya Civil Procedure Ordinance "decree" is defined in terms similar to the definition in the Zanzibar Civil Procedure Decree though there are differences which I shall refer to later. "Suit" is defined as meaning "all civil proceedings commenced in any manner prescribed", "prescribed" as meaning "prescribed by rules" and "rules" as meaning "rules and forms made by the Rules Committee to regulate the procedure of courts". The Court of Appeal, after considering those definitions, held that "the proceedings" could not be regarded as a suit. It followed that the magistrate's decision was not a decree, since it was not passed in a "suit". Referring to s. 72(1) of the Civil Procedure Ordinance which is in similar terms to s. 76(1) of the Zanzibar Civil Procedure Decree, the Court said:

"The difficulty confronting counsel in relying on this provision is that the decree passed by the Supreme Court, if it may be described as a decree, was not a decree within the meaning of the Civil Procedure Code. On this aspect of the case, our view is that no appeal lay from the Magistrate's

decision to the Supreme Court and that no appeal lies to this court, and that on that ground alone this appeal must fail . . .”

In *Sheikh Noordin's* case (2), the landlord applied to the Rent Board for an order for recovery of certain premises. The Board declined to exercise jurisdiction on the ground that the proceedings were a misuse of the Board's functions. The landlord appealed to the Supreme Court which dismissed the appeal on the ground that the decision of the Board was not a “determination” within the meaning of s. 7 of the Increase of Rent (Restriction) Ordinance, 1949, and therefore no appeal lay thereunder. On appeal to this court all three members of the court agreed that the Supreme Court was right and dismissed the appeal. The other point argued was whether an appeal from the determination of a Rent Board is final or whether a second appeal lay to this court. Lockhart-Smith J.A. delivered the leading judgment and held that a second appeal lay to this court. The President, Sir Barclay Nihill, concurred. The third member of the court, Thacker Ag. C.J., did not deal with the point. Lockhart-Smith J.A., after considering *Ahmed Kassam's* case (1), accepted the submission of the appellant's counsel that the provisions of the Civil Procedure Ordinance which were considered in *Ahmed Kassam's* case could not be materially distinguished from the comparative position obtaining under the Indian Code of Civil Procedure, though the word “suit” was not defined in the Indian Code. But he went on to hold that *Hem Singh v. Mahant Basant Das* (4), and other decisions which he referred to as the “Hem Singh” group of authorities governed the matter in issue and that such cases as *Rangoon Botatoung Co. v. Rangoon Collector* (5), which he referred to as the “Rangoon” group, were not applicable.

In *Hem Singh's* case (4), the question was whether a further appeal lay to His Majesty in Council from a decision of the High Court of Lahore, described as a decree, determining an appeal from a tribunal set up under the Sikh Gurdwaras Act, 1925. Under that Act the tribunal was given the same powers as are vested in a court by the Code of Civil Procedure and its proceedings were to be conducted as far as may be in accordance with the provisions of the Code. The formal expression of its decision is described by the Act as a decree or order. Their Lordships held that the jurisdiction conferred upon the High Court was intended to include the new subject matter as part of the ordinary appellate jurisdiction of the High Court, and the case was within the general principle laid down by Viscount Haldane, L.C in *National Telephone Co. Ltd. v. Postmaster General* (6), [1913] A.C. 546, at p. 552, that:

“when a question is stated to be referred to an established court without more, . . . it imports that the ordinary incidents of that court are to attach, and also that any general right of appeal from its decisions likewise attaches.”

Their Lordships followed the previous decisions of the Board in *Secretary of State for India v. Chelikani Rama Rao* (7), and *Maung Ba Thaw v. Ma Pin* (8), and held that the *Rangoon* case (5), was not applicable.

The *Rangoon* case (5), concerned an award of compensation by a collector in respect of certain lands compulsorily acquired under the Indian Land Acquisition Act, 1894. The appellants did not accept the award and demanded, as they were entitled to do, that the matter should be referred to “a principal court of original jurisdiction”. The reference was taken by two judges of the Chief Court who also sat as the High Court to which an appeal was given from the award of the court by s. 54 of the Act which then read:

“Subject to the provisions of the Code of Civil Procedure applicable to appeals from original decrees, an appeal shall lie to the High Court from the award or from any part of the award of the Court in any proceeding under this Act.”

The judges dismissed the references. The appeal to the Privy Council purported to be an appeal as of right from the award of the chief court. On behalf of the respondents it was submitted that the proceedings were those in reference and not in a suit, and they terminated in an award, and not a decree, from which only one appeal is given, and that it was unnecessary to give an appeal to the High Court by s. 54 if the decision were a decree and not merely an award. Their Lordships of the Privy Council, dismissing the appeal as incompetent, said at p. 201 of the report that they could not

“accept the argument or suggestion that when once the claimant is admitted to the High Court he has all the rights of an ordinary suitor, including the right to carry an award made in an arbitration as to the value of land taken for public purposes up to this Board as if it were a decree of the High Court made in the course of its ordinary jurisdiction”.

They did not deal expressly with the submission that the award was not a decree.

Returning to *Sheikh Noordin's* case (2), Lockhart-Smith J.A. said that in none of the decisions of the Privy Council in the *Hem Singh* (4), and *Rangoon* (5), groups of authorities to which he had referred did their Lordships direct their attention to the definitions which were the basis of the court's decision in *Ahmed Kassam's* case (1), that those definitions presented a real difficulty and that if that aspect of the matter had been more fully argued in the *Hem Singh* (4) group, it is possible a different conclusion might have been arrived at. He continued at page 48:

“Be that as it may, it must, in my opinion, now be regarded as well settled that once a matter has arrived at an established court by way of appeal, the ordinary legislation dealing with further appeals from that Court must be held to apply, unless excluded by special legislation, or unless the case can be brought within the principle laid down in the *Rangoon* (5) group of authorities.

Neither group was cited to this court in *Ahmed Kassam's* case (1), but if both had been cited it is not unlikely that the judges who then composed the court might have held that the *Rangoon* group (5) applied, as the matter in dispute was a decision in the nature of an arbitration by the then Rent Control Board. In view however, of the vast changes which have been made since *Ahmed Kassam's* case (1) in the jurisdiction, powers and duties of the Central Board, there can now be no doubt, in my opinion, that the *Hem Singh* (4) group applies with the result that an appeal to the Supreme Court from a determination of a Rent Control Board under s. 7 of the 1949 Ordinance as amended is not final, and that a further appeal lies to this court.”

Under the Kenya Increase of Rent and of Mortgage Interest (Restrictions) Ordinance, 1940, as in force at the time when *Ahmed Kassam's* case (1), was decided, the principal function of any Board established thereunder was to investigate complaints relating to tenancies made to it either by a tenant or landlord. Although where any dispute arose between any landlord and tenant relating to a tenancy to which the Ordinance applied, no proceedings arising out of such dispute could be instituted in any court of law except with the written consent of the Board, once such consent was obtained, the subsequent proceedings were entirely a matter for the courts. The Board, in the determination of any matter, was empowered to take into consideration any evidence which it considered relevant, notwithstanding that such evidence would not be admissible under the law relating to evidence.

The Kenya Increase of Rent (Restriction) Ordinance, 1949 which was in force when *Sheikh Noordin's* case (2) was decided, gave the Central Board very much

wider powers. It had, inter alia, power to make orders for the recovery of the possession of premises and for payment of arrears of rent. It had power to award costs, to administer oaths, to order discovery and production of documents in like manner as in proceedings in the Supreme Court and generally to exercise jurisdiction in all civil matters and questions arising under the Ordinance. The power to act on less than legal evidence was omitted and it had exclusive jurisdiction to deal with any claim or other proceeding arising under the Ordinance. Those are illustrations of the “vast changes” referred to by Lockhart-Smith J.A. in *Sheikh Noordin’s* case (2).

The powers conferred on Rent Restriction Boards by the Zanzibar Rent Restriction Decree are similar to those of the Central Board under the 1949 Kenya Ordinance, though the jurisdiction of the courts is not entirely ousted and the Boards have power to act on less than legal evidence. On the other hand, by s. 9(10) the proceedings of a Board are deemed to be judicial proceedings.

In *Bhagat Singh’s* case (3) the appeal arose out of proceedings before the Central Rent Board in which the appellant had claimed possession of certain premises under the provisions of the Kenya Increase of Rent (Restriction) Ordinance, 1949. His claim was dismissed as was his appeal to the Supreme Court. On the second appeal a preliminary objection was taken that, where an appeal from a Rent Board has been heard by the Supreme Court, no further appeal can lie on the ground that the decision of the Supreme Court in such an appeal is not a decree, but an order, and by virtue of s. 75(2) or the Civil Procedure Ordinance, is not appealable. Subsection (1) of s. 75, which was amended after the decision in *Ahmed Kassam’s* case (1), provides that an appeal shall lie as of right from the orders specified therein and shall also lie from any other order with the leave of the court making such order or of the court to which an appeal would lie if leave were granted. Subsection (2) provides that no appeal shall lie from any order passed in appeal under the section. It was held that the final determination of an appeal from a decision of a Rent Board is a judgment giving rise to a decree and from such a decree an appeal lies to the Court of Appeal. Briggs J.A. delivered the leading judgment with which the other members of the court concurred. He came to the following conclusions:

- (a) The proceedings in the Rent Board were not a “suit” within the meaning of the Civil Procedure Ordinance, since they were not “commenced in any manner” . . . “prescribed by” . . . “rules and forms made by the Rules Committee to regulate the procedure of courts.”
- (b) Without deciding whether the Rent Board is a “civil court”, he held that the decision of the Board was not a decree since it was not made in a suit. It was probably not an “order” as defined in the Civil Procedure Ordinance, but it was an order in the general sense made under a special or local law, within the meaning of s. 79 (b) of the Ordinance. Section 79 occurs in Part VII under the heading “Appeals”. Part VII has four sub-parts namely, “Appeals from Original Decrees”, “Appeals from Appellate Decrees”, “Appeals from Orders” and “General Provisions Relating to Appeals”. The section reads:

“The provisions of this part relating to appeals from original decrees shall, as far as may be, apply to appeals:

- (a) from appellate decrees, and
- (b) from orders made under this Ordinance or under any special or local law in which a different procedure is not provided.”
- (c) In Kenya, if the appeal is from an order, provided the decision appealed from was made in a “suit”, a decree may be made on appeal from it. When an appeal is filed a new lis arises, the issue being in general the correctness or

incorrectness of the decision appealed from, and that lis is “conclusively determined” in the suit by the appellate decree.

- (d) If the order appealed from is not made in a “suit” there are two possible arguments as to the nature of the appellate decision, but both lead to the same conclusion. In the case of an order made under a special or local law within the provisions of s. 79 (b), the order is to be deemed to be an original decree for purposes of appeal to the Supreme Court. In such a case there is a notional “suit” in which a decree can be made. Alternatively, an appeal in Kenya from a subordinate court may itself be a “suit” in that it is a proceeding “commenced in manner prescribed”. This view may be justified for two reasons: first by the special definition of “suit” as opposed to the governing decision in India that a suit is ordinarily a proceeding started by a plaint: see *Hansraj v. Dehra Dun-Mussoorie Electric Tramway Co. Ltd.* (9). Secondly, because according to ordinary conceptions an appeal is something different from the cause from which the appeal sprang. Where the appeal is not from a decree or order in the strict sense of s. 2, and is “commenced”, as is a Rent Board Appeal, under authority of another Statute, the argument will not apply directly, but a “suit” might be brought into existence by operation of s. 79 (b). The learned Justice of Appeal rested his decision on the first of the above propositions. He fully appreciated that the propositions set out in (c) and (d) above are, in his own words, entirely opposed to Indian ideas, but he based his conclusions on amendments to the Civil Procedure Ordinance and Rules which showed that Indian ideas relating to appeals had been largely abandoned, and English principles widening the right of appeal had been imported. He explained *Ahmed Kassam’s* case (1) on the ground that s. 79 (b) could not apply to a special statutory appeal brought to a magistrate, but applied only to appeals brought to the Supreme Court. As to *Sheikh Noordin’s* case (2) after confessing that he had great difficulty in following the reasoning of the majority of the court, he said at p. 181:

“The decisions in *S. of S. for India v. Chelekani* (7), and *S. of S. for India v. Hindusthan Co-op Soc. Ltd.* (11) seem to me to emphasize the importance of the exact meaning of ‘decree’. It is not in dispute that a decree can only be made in a suit, but in India the word ‘suit’ in the Code is not defined. The existence of a right of appeal in India clearly depended on the status of the decision appealed from as a ‘decree’, and therefore of the proceedings which gave rise to it as a suit.”

He thought the basis of the reasoning of Lockhart-Smith J.A. in *Sheikh Noordin’s* case (2) was that the order of the Rent Board which was made under a special or local law within the provisions of s. 79 (b) must be deemed to be an original decree for the purposes of appeal to the Supreme Court.

Counsel for the appellant relied strongly on *Bhagat Singh’s* case (3), but in my view it has no application in Zanzibar. As I have said, that decision was based on the divergence of the Kenya Civil Procedure Code and Rules from Indian ideas in so far as they relate to appeals. But, from a comparison of the relevant provisions of the Zanzibar Civil Procedure Code and Rules with the Indian Code of Civil Procedure and Rules I am satisfied that they are substantially the same and that such differences as there are could not form a basis for the reasoning which was adopted in *Bhagat Singh’s* case (3). In the Zanzibar Civil Procedure Decree, as in the Indian Code of Civil Procedure, there is no definition of “suit”. In *Bhagat Singh’s* case (3) emphasis was placed on the difference between the Kenya Order XLI relating to appeals and the corresponding Order XLI in India. But the corresponding Order XLVI in Zanzibar is, in substance, almost identical with Order XLI in India. Again, in *Bhagat Singh’s*

case (3) the conclusion was reached from the wording of Order XLI coupled with the absence of a definition of “judgment”, and the amended definition of “decree” which makes a judgment itself appealable, that a judgment is a pronouncement on which a decree is based. This was a very important aspect of the decision. But in Zanzibar, as in India, “judgment” is defined as meaning “the statement given by the judge of the grounds of a decree or order”, and is not referred to in the definition of decree.

I have mentioned that there are differences between the definition of “decree” in the Zanzibar Civil Procedure Decree and the definition in Kenya. In Kenya, as in India, the words “as used in reference to a suit” in that part of the Zanzibar definition which I have quoted do not appear. Otherwise that part of the definition is substantially the same. In Kenya there is a further difference in that it is provided that for the purposes of appeal the word “decree” shall include “judgment”. I do not think that the addition of the words “as used in reference to a suit” have any effect in changing what would otherwise be the meaning of the definition. I do not accept the submission of counsel for the appellant that the implication from the addition of the words is that there can be a decree, in the sense of an adjudication of a court, otherwise than in a suit. It is probable that the words were inserted, *ex abundanti cautela*, so as to make it clear that decrees of the legislature are excluded.

The meaning to be attached to the word “suit” in India was referred to by the Privy Council in *Hansraj v. Dehra Dun-Mussoorie Electric Tramway Co. Ltd.* (9). Their Lordships, when considering the question of limitation under the Indian Limitation Act, 1908, said (60 I.A. at p. 18):

“There is no definition of suit in the Act”, (i.e. the Indian Limitation Act), “beyond the provision, contained in s. 2, that unless there is anything repugnant in the subject or context, ‘suit’ does not include an appeal or an application. The word ‘suit’ ordinarily means, and apart from some context must be taken to mean, a civil proceeding instituted by the presentation of a plaint.”

That meaning is no doubt derived from the following provisions of the Indian Civil Procedure Code and Rules:

“Section 26: Every suit shall be instituted by the presentation of a plaint or in such other manner as may be prescribed.”

“Prescribed” is defined in s. 2 as meaning “prescribed by rules” and “rules” as meaning “rules and forms contained in the First Schedule or made under s. 122 or s. 125”.

Rule 1 of Order IV: “Every suit shall be instituted by presenting a plaint to the court or such officer as it appoints in this behalf.”

In the Zanzibar Civil Procedure Decree s. 19 is in the same terms as the Indian s. 26. There is no definition of “prescribed”, but “Rules” are defined as meaning “Rules and Forms contained in the First Schedule or made under section 110”. Order IV rule 1 of the Rules, that is the First Schedule, deals separately with the institution of suits in the High Court and subordinate courts. In the High Court the rule is the same as in India, namely, every suit shall be instituted by presenting a plaint to the court. In subordinate courts a suit may be instituted either by presenting a plaint or by applying verbally or in writing for a summons with a concise statement of the claim enclosed thereon but, in the latter case, the court may order the plaintiff to file a plaint. In the circumstances I think that “prescribed” in s. 19 must be taken as meaning “prescribed by rules as defined”.

The Indian and Zanzibar provisions are so similar that I think it must be

accepted that in Zanzibar also “suit” ordinarily means a civil proceeding instituted by a plaintiff. I doubt whether a Rent Restriction Board is a court as defined but, even if it is, proceedings before the Board cannot, in my view, be regarded as a suit. They are not commenced by a plaintiff or in any other manner prescribed by rules as defined. The determination of a Board, therefore, is not a decree, but an order.

In India,

“an appeal is not a fresh suit but is only a continuation of the original proceedings and a stage in the suit itself. The decree passed by the appellate court is a decree in the suit and the appellate judgment stands in the place of the original judgment for all legal purposes.”

Chitaley and Rao’s Commentaries on the Code of Civil Procedure (5th Edn.) Vol. 1, p. 954. An appeal from a decree will, therefore, result in a decree if the appeal is finally determined and an appeal from an order will result in an order. The decision of the High Court was accordingly an order and not a decree. Section 84 of the Zanzibar Civil Procedure Decree which corresponds with s. 79 (b) of the Kenya Civil Procedure Ordinance and s. 108 (b) of the Indian Code of Civil Procedure is, in my opinion, in Zanzibar, as it is in India, purely a procedural provision. The marginal note to the Indian s. 108 is “Procedure in appeals from appellate decrees and orders”. The Zanzibar s. 84 does not, in my view, by implication or otherwise, give any right of appeal from orders as if they are decrees.

Counsel for the appellant referred to Article 37 of the Zanzibar Order in Council, 1924 as amended by the Zanzibar Order in Council, 1952. The relevant part of the Article reads:

“37(1) An appeal shall lie to the Court of Appeal from any judgment or any part of a judgment passed or made by the High Court in the exercise of its original or appellate jurisdiction in such cases and in such manner as may be prescribed by any law for the time being in force in Zanzibar.

(3) In this Article ‘judgment’ includes decree, order and decision.”

He submitted that the effect of the Article is to confer a right of appeal to the Court of Appeal from the orders of the High Court. I do not agree. The Article is clearly only an enabling provision which does not itself confer any right of appeal.

I turn now to the effect of the *Hem Singh* (4) and *Rangoon* (5) groups of authorities. In *Hem Singh*’s case (4) the decision of the High Court was described as a decree. The formal expression of the decision of the tribunal from which the appeal lay to the High Court is described in the Sikh Gurdwaras Act as a decree or order. It can, I think, be assumed that the decision of the tribunal was a decree.

Secretary of state for India v. Chelikani Rama Rao (7), which was followed in *Hem Singh*’s case (4), concerned consolidated appeals from two decrees of the High Court at Madras. Under a Madras Forest Act, the Forest Settlement Officer was charged with the duty to examine all claims made to land within a certain area which the Government was proposing to constitute a reserved forest. The respondent claimed to be the owner of three parcels of land within the notified area, but the Forest Settlement Officer rejected his claims. Section 10 of the Act provided that the Forest Settlement Officer

“shall pass an order specifying the particulars of such claim and admitting or rejecting the same wholly or in part.”

The same section provided that:

“If such claim be rejected wholly or in part, the claimant may, within thirty days of the date of the order, prefer an appeal to the district court in respect of such rejection only.”

On appeal being made to the district court, the district judge affirmed the Forest Settlement Officer’s decision. No further appeal had been provided for expressly by the Act, and it was contended that all further proceedings were incompetent. On behalf of the appellants it was argued that the decision of the district judge was not a “decree” within s. 2 of the Code of Civil Procedure of 1882, and consequently there was no appeal given by s. 584 of the Code which provided that a limited appeal lay to the High Court, from every decree passed on appeal by any court subordinate to the High Court. The Privy Council rejected the contention. Their Lordships view was (43 I.A. at p. 197):

“... when proceedings of this character reach the district court, that court is appealed to as one of the ordinary courts of the country, with regard to whose procedure, orders, and decrees the ordinary rules of the Civil Procedure Code apply. This is in full accord with the decision of the Full Bench in *Kamaraju v. Secretary of State for India in Council* (11) a decision which was given in 1888 and has been acted on in Madras ever since.”

After referring to the *Rangoon* case (5), their Lordships said at p. 198:

“The merits of the present dispute are essentially different in character. The claim was the assertion of a legal right to possession of and property in land; and if the ordinary Courts of the country are seized of a dispute of that character, it would require, in the opinion of the Board, a specific limitation to exclude the ordinary incidents of litigation.”

Although in s. 10 of the Madras Forest Act the decision of the district judge was referred to as an order, it seems that it was a decree within the meaning of the definition of “decree” in the Indian Code of Civil Procedure of 1882 which was in force at the relevant time. In that Code “decree” was defined (omitting the immaterial portion) as meaning:

“the formal expression of an adjudication upon any right claimed, or defence set up, in a Civil Court when such adjudication, so far as regards the court expressing it, decides the suit or appeal.”

In *Kamaraju v. Secretary of State for India in Council* (10) (referred to by their Lordships in *Secretary of State for India v. Chelikani Rama Rao* (7)) the High Court of Madras held that the decision of the District Court passed on appeal from the decision of the Forest Settlement Officer under the same Madras Forest Act was clearly a decree within the meaning of the Civil Procedure Code of 1882. It appears from the definition of “decree” in that Code that the decision of an appellate court deciding an appeal is a decree whether or not the decision appealed from was made in a suit.

Maung Ba Thaw v. Ma Pin (8) referred to and allowed in *Hem Singh’s* case (4) was an appeal from a decree of the High Court at Rangoon reversing an order of a district court which rejected an application by the respondent under the Provincial insolvency Act, 1920 to be placed on the schedule of creditors. The respondent raised a preliminary objection to the competency of the appeal, maintaining that under s. 4, sub-s. (2), of the Provincial Insolvency Act the decision of the district court was final, subject only to a limited right of appeal to the High Court under s. 75, sub-s., (2), any right of further appeal being thereby excluded. Their Lordships said (61 I.A. at p. 161):

“This objection is not maintainable, in view of the decision of this Board in *Secretary of State for India v. Chelikani Rama Rao* (7) in which a similar objection was taken in respect of the provisions of the Madras Forest Act

of 1882, and it was held that, when such a right of appeal is given to one of the ordinary courts of the country, the procedure, orders and decrees of that court will be governed by the ordinary rules of the Code of Civil Procedure.”

The Provincial Insolvency Act, 1920, is not available here and it does not appear whether the proceedings in the district court constituted a suit. Their Lordships made no reference to the different definition of decree in the 1908 Code of Civil Procedure, but since the decision of the High Court was referred to as a decree I think it must be taken that the decision of the district court was also a decree. It does not appear to have been argued that the decision of the district court was not a decree.

In the *Rangoon* case (5) I think it is clear that the award from which it was sought to appeal was not a decree. The other case referred to in the Rangoon group is *Secretary of State for India v. Hindusthan Co-operative Insurance Society Ltd.* (11). In that case a tribunal appointed under the local Calcutta Improvement Act, 1911 had made an award of compensation in respect of land compulsorily acquired. The local Act empowered trustees to make acquisitions of land under the Land Acquisition Act, 1894, which was of general application throughout British India, but modified that Act for the purposes of the local Act. The effect was to enact for the purposes of the local Act a special law for the acquisition of land by the trustees within the limited area over which their powers extended. The provisions of the local Act operated to omit from that Act the general right of appeal to the High Court which was given by s. 54 of the Land Acquisition Act, 1894; but Act XVIII of 1911 of the Governor-General in Council provided for a limited right of appeal to the High Court from the award of the tribunal. That right was exercised, but both parties were dissatisfied with the High Court’s decision, and preferred further appeals to the Privy Council. Since the *Rangoon* case (5), the Land Acquisition Act, 1894, had been amended by Act XIX of 1921, under which every award of the court under that principal Act was deemed to be a decree, and the statement of the grounds of the award a judgment, within the definitions of “decree” and “judgment” respectively contained in the Indian Code of Civil Procedure. The amending Act also substituted for s. 54 of the principal Act a new section which gave in terms a right of appeal to the Privy Council from any decree passed by the High Court on appeal from an award of the court. It was not disputed that under the local legislation there could be no right of appeal to the Privy Council, but it was contended that the amendments made in 1921 to the Land Acquisition Act should be read into the local Calcutta Act. The Board rejected that contention and dismissed the appeals as incompetent. The important part of the judgment so far as it concerns the issue before this court is as follows (58 I.A. at p. 265):

“It is upon the new s. 26 sub-s. 2 introduced by the Act of 1921 into the Land Requisition Act, that reliance is placed. The argument addressed to their Lordships is that this subsection must be read into the local Act, with the effect that every award of the tribunal must now be deemed to be a decree within the meaning of the Civil Procedure Code, and therefore, as their Lordships understand, ex vi termini appealable to His Majesty in Council under the letters patent of the High Court. It is said that this amendment of itself is sufficient to displace the grounds upon which the Board held in the *Rangoon Botatoung Co’s* case that no appeal lay. If effect were given to this argument it would seem to follow that the amendment of s. 54 was wholly superfluous, and the somewhat strange result would be arrived at that though the provision of the amending Act by which the right of appeal to His Majesty in Council is expressly given was excluded in the case of awards by the tribunal, they were nevertheless to be so appealable by implication from another section.”

The clear implication from that passage is that, notwithstanding the amendment by which every award was deemed to be a decree, the principle laid down in the *Rangoon* case (5) would still have applied, and there would have been no appeal from the decree of the High Court, if an express right of appeal had not been given by the new s. 54.

My conclusion from the authorities to which I have referred is that the principle laid down in the *Rangoon* case (5), when it is applicable, operates to exclude the provisions of a general right of appeal and that the principle laid down in the *Hem Singh* (4) group of authorities does not extend the general right of appeal given by the local legislation. I can find nothing in those authorities which compels me to take a contrary view. As I have indicated, the decision in *Hem Singh's* case (4) and the decisions in the other cases in that group from which it was sought to appeal all appear to have been decrees and not orders, and the question for determination was whether the appellate court was exercising a special jurisdiction so as to exclude the general right of appeal from decrees. I do not think that that aspect was fully appreciated in *Sheikh Noordin's* case (2) and I am content to adopt the explanation of the decision in that case which was suggested by BRIGGS J.A. in *Bhagat Singh's* case (3).

Counsel for the appellant referred us to *Cowasjee Dinshaw v. Cowasjee's Staff Association* (12). That was an appeal from a judgment and order of the Supreme Court of Aden dismissing an appeal against an award made by the President of the Industrial Court established by s. 5 of the Industrial Relations (Conciliation and Arbitration) Ordinance, 1960. By s. 19 of that Ordinance an appeal against an award lay to the Supreme Court on a point of law. A preliminary objection was taken that no appeal lay to the Court of Appeal from the decision of the Supreme Court. It was held, following *Sheikh Noordin's* case (2) and the authorities cited therein, that an appeal did lie to this court. That decision is, however, of no assistance to the appellant since by s. 6 of the Appeals to the Court of Appeal Ordinance (Cap. 7 of the Laws of Aden), an appeal lay as of right from the final judgment (which by definition includes order) of the Supreme Court. On the contrary I think it affords some support for the view I have taken.

To sum up, the decision of the Rent Restriction Board was an order, and not a decree, since it was not made in a suit. In Zanzibar, as in India, an appeal is not a fresh suit, but only a continuation of the original proceedings and the decision in appeal, in the absence of any provision to the contrary, has the same status or character as the decision appealed from. In Zanzibar there is no provision to the contrary in so far as an appeal from a Rent Restriction Board is concerned. It follows that the decision of the High Court in appeal is not a decree, but an order. No further appeal lies from an order made in appeal. The distinction between the *Rangoon* (5) and *Hem Singh* (4) groups of authorities does not need to be considered, for it is relevant only where a general right of appeal exists embracing the class of decision (e.g., order or decree) from which it is sought to appeal. In Zanzibar there is no general right of appeal against even orders in the original jurisdiction and none at all against orders in the appellate jurisdiction.

In my view, therefore, the appeal should be dismissed with costs as incompetent.

In case I should be wrong in that conclusion I think it desirable to express my opinion on the merits of the appeal. The application before the Rent Restriction Board was for assessment of the standard rent of the Majestic Building, of which the appellant was the landlord, and for apportionment thereof in respect of those portions occupied by the appellant and the two respondents. The first

respondent occupied the portion known as the Pigalle Hotel, the second respondent, East African Airways, occupied offices on the ground floor and the remainder of the building, the Majestic Cinema, was in the occupation of the appellant. As the Majestic Cinema was occupied by the owner, the Board found it unnecessary to ascertain the standard rent of those premises. The standard rent of the portion occupied by the first respondent was assessed at Shs. 9,887/- per annum and that portion occupied by East African Airways at Shs. 6,670/- per annum. It may be noted here that if the standard rent of any premises in excess of Shs. 10,000/- the premises become decontrolled.

The appellant appealed to the High Court from the decision of the Board and the appeal was dismissed. If there is a second appeal to this court it lies only on a matter of law or on the ground of a substantial error or defect in procedure. In my view there was no error or defect in procedure and it has not been seriously suggested that there was. As to second appeals in India where there is limited right of appeal on the same grounds as in Zanzibar, their Lordships of the Privy Council had this to say in *Mussumat Durga Choudhrai v. Jawahir Singh Choudhri* (13) (1890), 17 I.A. 122 at p. 127:

“It is enough in the present case to say that an erroneous finding of fact is a different thing from an error or defect in procedure, and that there is no jurisdiction to entertain a second appeal on the ground of an erroneous finding of fact, however gross or inexcusable the error may seem to be. Where there is no error or defect in the procedure, the finding of the first appellate court upon a question of fact is final, if that court had before it evidence proper for its consideration in support of the finding.”

It is common ground that the Majestic Building was substantially reconstructed in 1955, which is after the “prescribed date” as defined, and that it was first let thereafter on November 1, 1955. It is also not in dispute that the standard rent of each of the two premises in question was a rent to be assessed by the Board the annual total of which did not exceed ten per cent, of the market cost of construction of the premises at the date of completing such construction (other than the cost of providing new electrical installations) together with, in the case of new electrical installations, a sum not exceeding fifteen per cent. of the cost of providing such installations.

The Board found the market cost of construction of the premises occupied by the Pigalle Hotel and East African Airways to be as follows:

Pigalle Hotel

Cost of construction of premises excluding cost of electrical installations: Shs. 94,670/- plus Shs. 750/- proportion of architect's fee and Shs. 1,000/- proportion of allowance for existing foundation:	Shs. 96,420
Cost of electrical installations:	<u>Shs. 2,300</u>
	<u>Shs. 98,720</u>

East African Airways Premises

Cost of construction of premises excluding cost of electrical installations; Shs. 63,795/-plus Shs. 750/-proportion of architect's fee and Shs. 1,000/- proportion of allowance for existing foundation:	Shs. 65,500
Cost of electrical installations:	<u>Shs. 800</u>
	<u>Shs. 66,300</u>

The standard rent was arrived at by taking ten per cent, of the sum first mentioned in each case plus fifteen per cent, of the cost of electrical installations. The Board, therefore, assessed the standard rent in each case at the maximum permitted percentage of the market cost of construction.

I do not propose to set out the evidence before the Board, but when considering the grounds of appeal will refer to such parts of the evidence as are material to those grounds.

The first ground of appeal, as finally argued, is that the Board should first have ascertained the market cost of construction of the whole building and should then have allocated to each premises occupied by the respondents the proportionate cost of each premises on a cubic or square footage basis. This the Board did not do, but it was said, estimated the cost of construction of each premises on an arbitrary basis. Although I do not agree that the Board must have ignored the cost of construction of the whole building, it is true that they did not arrive at the cost of construction of the separate premises by taking a proportion of the total cost of the whole building on a footage basis. The function of the Board is to ascertain the market cost of construction of the premises in respect of which standard rent has to be assessed. If part of a building is separately let, that part constitutes separate "premises" as defined in the Rent Restriction Decree. Where the premises in question form only part of a building, one method of arriving at the cost of construction of that part would be on a proportionate footage basis. But that is not the only method of calculating the cost of construction of the premises or, necessarily, the correct method. Parts of a building may be built to a standard inferior to the remainder of the building and, in such a case, it would clearly be wrong to calculate the cost of construction of those parts mathematically on a footage basis as a fraction of the cost of the whole building. It is evident that the Board took that factor into consideration and even the architect, Mr. Cameron, who gave evidence for the appellant, based his estimates on different costs of construction for different parts of the building. In my view, therefore, the Board did not err in law in failing to adopt the method of calculation which the appellant contends should have been adopted.

The second ground of appeal is as follows:

"In upholding the decision of the Rent Restriction Board the learned Acting Chief Justice erred in not holding that the Rent Restriction Board misdirected itself:

- (a) in ignoring the unchallenged evidence put forward by the appellant;
- (b) in rejecting the evidence of Mr. Cameron, a Chartered Architect, on the ground that the Board had viewed the premises and formed its own assessment, which was injudicious and not warranted by the Rent Restriction Decree, Cap. 98;
- (c) in accepting the evidence of Mr. Chhaniyara, an unqualified building designer;
- (d) in putting its own view in the place of evidence and in drawing inferences therefrom; and
- (e) in injudiciously exercising their discretion in weighing the evidence whereby injustice had been done to the appellant."

For the appellant Mr. Hassanali Jaffer Hameer, the managing director of the appellant company, Mr. Cameron, an architect, and Mr. P. H. Patel of G. A. K. Patel & Co. Ltd., the contractors who carried out the reconstruction of the building, gave evidence. Mr. Chhaniyara, a building designer, gave evidence for the first respondent.

Mr. Hameer testified that he paid the contractors, G. A. K. Patel & Co. Ltd., the sum of Shs. 767,500/- for the reconstruction and he produced receipts

therefor. He said that the electrical installations were the subject of a separate contract, the total cost of which was Shs. 37,500/-, but he had lost the receipt showing that he paid that amount. However, he produced the contractors' invoice for Shs. 37,500/-.

Mr. Cameron valued the separate premises as follows:

Pigalle Hotel

57,240 cubic feet at Shs. 3/- per cubic foot	£8,586
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Add

Architect's fees	200
Existing foundations	250
Electrical extras	615
Chimney	10
Water tank	42
	<hr/> £9,703 <hr/>

East African Airways

18,760 cubic feet at Shs. 4/50 per cubic foot	£4,221
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Add

Architect's fees	100
Existing foundations	125
Electrical	125
Portion of R.C. Canopy	450
	<hr/> £5,021 <hr/>

Mr. Patel produced a statement which he said showed the separate cost of construction of the different portions of the building, taking the total contract price, excluding the cost of electrical installations and of the existing foundation, as Shs. 775,965/-. That figure, it will be observed, is larger than the sum which Mr. Hameer said he paid the contractors. Mr. Patel's figures were:

East African Airways Offices	Shs. 63,795/-
Pigalle Hotel	230,065/-
Cinema	482,105/-
	<hr/> Shs. 775,965/- <hr/>

Finally, Mr. Chhaniyara's valuation of the cost of construction of the Pigalle Hotel premises, excluding the electrical installations, was Shs. 94,670/-. His valuation was on a square footage basis. The electrical installations in the Pigalle Hotel he valued at Shs. 2,300/-.

As to the premises occupied by the Pigalle Hotel, the Board accepted Mr. Chhaniyara's valuation of Shs. 94,670/- because, they said, "it accords with our independent assessment formed after a view of the premises, a weighing of the evidence before us including a study of the plans (Exhibit F)". They also accepted his estimate of Shs. 2,300/- for the cost of the electrical fittings. The latter estimate appears to be made up as follows:

80 electric points at 25/-	Shs. 2,000/-
2 cooker plugs at 40/-	80/-
4 fan plugs at 55/-	220/-
	<hr/>
	Shs. 2,300/-
	<hr/>

As to the East African Airways' premises, the Board accepted Mr. Patel's valuation of Shs. 63,795/- as that accorded with their "independent view of its market cost of construction". They estimated the cost of the electrical fittings at Shs. 800/-. There was evidence that there were 25 electrical points in the offices and evidence as to the cost of electrical points.

It was submitted that the opinion evidence of Mr. Chhaniyara as to the cost of construction of the premises occupied by Pigalle Hotel was not admissible as he was not qualified as an expert to give such evidence. It is true that Mr. Chhaniyara had no professional qualifications, but he had had ten years practical experience as a building designer. In my view such experience was sufficient to qualify him to give opinion evidence as to the cost of construction, though the weight which could be attached to his evidence is another matter. Questions as to the weight to be attached to evidence and as to the credibility of witnesses are not, however, questions of law. Furthermore, sub-s. (3) of s. 9 of the Rent Restriction Decree provides:

"In its determination of any matter a Board may take into consideration any evidence which it considers relevant to the subject of the inquiry before it, notwithstanding that such evidence would not be admissible under the law relating to evidence."

It was not suggested that Mr. Patel's evidence as to the cost of construction was not admissible. Apart from the proportion of the architect's fee and the proportion of the allowance for the existing foundation which should be allocated to the different premises, and I shall deal separately with those matters, there was, therefore, evidence properly before the Board on which they could come to the conclusions they did as to the cost of construction. It is impossible to say that they erred in law in acting on such evidence. They were entitled to use their own experience, and knowledge gained from a view, in deciding what evidence to accept.

The third ground of appeal relates to the apportionment of the architect's fee and the cost of the foundation. It is not in dispute that the architect's fee was Shs. 16,000/- and that the allowance for the cost of construction of the existing foundation was Shs. 20,000/-. As I have indicated, the Board allocated Shs. 750/- of the architect's fee and Shs. 1,000/- of the cost of the foundation to each of the premises occupied by the respondents. It was submitted that the Board erred in law in apportioning those costs as they did, in that they ignored the evidence of Mr. Cameron and came to their conclusion arbitrarily, relying on conjecture and surmise. I do not agree. It was conceded by counsel for the appellant that the Cinema was the important portion of the building and that the major part of these costs should be borne by the Cinema portion. That was also the conclusion of the Board. It then became a question of how much.

The Board had inspected the building, as they were empowered to do by virtue of s. 9 (1) of the Rent Restriction Decree, and they also studied the plans. In my view they were not bound to accept the evidence of Mr. Cameron and, in the circumstances of this case, where the Board had only to assess the proportion of the architect's fees and of the cost of the foundation which should be allocated to the premises occupied by the respondents, it being accepted that the major proportion should be borne by the Cinema, I think they were entitled to use their own judgment and experience, and their own knowledge gained from a view of the premises and a study of the plans, in coming to their conclusion. I do not think that the view I have taken conflicts with anything that was said in *Jafferji Essaji v. Laxmibai G. Pratap* (14), and *Patel v. Bhimji Jiwa & Sons* (15), to which we were referred. My opinion, therefore, in so far as this ground of appeal is concerned, is that the Board did not act unjudicially or contrary to law.

I do not think there is any substance in the fourth ground of appeal which is that the learned Acting Chief Justice erred in holding that the Board had assessed the market cost of construction of the premises occupied by the first respondent at the date of completing the construction, namely September, 1955, in the absence of any evidence before the Board to that effect. As to this the Acting Chief Justice said:

“The evidence on the record is that the building reconstruction was completed in 1955. Section 4(1)(b) of the Decree is relevant. Counsel for the landlord – appellant argued that the Board has assessed standard rent on present day cost of construction. Page I of the Ruling (of the Board) makes it clear that the Board had firmly in mind the year 1955. ‘We state this not merely for the purpose of blaming the applicant but for the purpose of underlining our difficulty in determining the market cost of construction of the building at the date of its completion in 1955.’ I understood Mr. Cameron’s evidence at page 7 of the record to mean that his valuation is based on 1955. He is telling the Board that present day prices are a fair guide to prices in 1955.”

I agree that the Board had the year 1955 firmly in mind when assessing the cost of construction. It seems that Mr. Chhaniyara based his valuation on the cost of construction in 1961 when he gave evidence before the Board, but in view of Mr. Cameron’s evidence, referred to by the Acting Chief Justice, as to the comparative costs in 1955 and 1961, I do not think that factor is of any material importance.

The last matter which was argued relates to an additional water tank which was fitted at a cost of Shs. 844/47 after the premises were let. It was submitted that the fitting of that tank constituted “special circumstances” within the meaning of s. 4(4)(a) of the Rent Restriction Decree, so as to justify an increase in the standard rent.

Paragraph (a) of sub-s. (4) of s. 4 reads:

“in the case of any premises in regard to which a Board is satisfied that in the special circumstances of the case it would be fair and reasonable to alter, whether by way of increase or reduction, the amount of the standard rent as ascertained in accordance with subsection (1), the Board may assess the standard rent of such premises at such figure as the Board shall in all the circumstances of the case consider reasonable.”

“Special circumstances” are defined in sub-s. (4) (omitting the immaterial parts) as including:

“... any expenditure incurred by the landlord ... in providing a suitable water supply ... or the extension of such water supply ... from which the tenant derives benefit.”

The Board made no reference to the water tank in their ruling. The cost of the tank is included in the appellant’s application to the Board, but it is included in the general cost of construction of the Pigalle Hotel portion of the building and not as a special item of expenditure on which to base a claim for an increase of the standard rent under s. 4(4)(a). Although there is a reference to s. 4(4)(a) in counsel for the appellant’s address to the Board, it is at the least doubtful whether the Board were ever asked to increase the standard rent because an additional water tank had been fitted. Indeed, it appears that the cost of the water tank was put forward as part of the cost of construction of the building.

In these circumstances, and having regard to the extreme weakness of the evidence that the fitting of the tank could be considered as an extension of the

water supply to the Pigalle Hotel, and to the small value of the tank, I can find no sufficient basis for sending the matter back to the Board for further consideration.

In my opinion, therefore, the appeal would not have succeeded on the merits but, for the reasons which I have given, I would dismiss the appeal with costs as incompetent.

Sir Trevor Gould VP: I have had the advantage of reading the judgment of the learned President. I agree with his reasoning and conclusions in all respects and with the order proposed by him.

Crawshaw JA: I also agree.

Preliminary objection sustained.

Appeal dismissed.

For the appellant:

Parkar & Co., Zanzibar

K. S. Talati and A. M. S. Parkar

For the first respondent:

Lakha & Co., Zanzibar

W. D. Fraser Murray and A. A. Lakha

The second respondent did not appear and was not represented.

Yusuf Omari and another v Republic [1964] 1 EA 162 (HCT)

Division:	High Court of Tanganyika at Dar-es-Salaam
Date of judgment:	4 December 1963
Case Number:	722 and 723/1963
Before:	Reide J
Sourced by:	LawAfrica

[1] Criminal law – False pretences – Obtaining goods by false pretences – Inducing owner to deliver vehicle – Vehicle subject matter of hire purchase agreement – Delivery obtained by false pretences that accused represented hirer of vehicle – Evidence that possession but not ownership obtained – Whether offence committed.

Editor's Summary

The appellants were convicted of obtaining a bus by false pretences contrary to s. 302 of the Penal Code,

by inducing the owner of the bus to deliver it to the first appellant by falsely pretending that the first appellant represented the firm entitled to delivery thereof. It was common ground that the bus was the subject matter of a hire purchase agreement between the owner and a firm and that on delivery the firm would have obtained possession but not the ownership of the bus. On appeal,

Held –

- (i) s. 302 of the Penal Code must be read as a whole, and, so read, creates an offence of one character only, that is, one whereby ownership of property is obtained; the words “or induces any other person to deliver to any person” are merely intended to provide for a situation where the person charged obtains ownership of anything for a third party by contriving a delivery either to himself or someone else;
- (ii) the words “any person” on their second appearance in s. 302, *ibid*, should be construed as including the person charged;
- (iii) an offence of obtaining goods by false pretences under s. 302 of the Penal Code is not committed if possession only but not ownership is obtained of the goods.

Appeal allowed. Conviction quashed.

Cases referred to in judgment:

- (1) *R. v. Schweller* (1924), 18 Cr. App. Rep. 52.
- (2) *R. v. Kilham* (1870), L.R. 1 C.C.R. 261; (1870), 22 L.T. 625.
- (3) *R. v. Ball*, [1951] 2 K.B. 109; 35 Cr. App. Rep. 24.
- (4) *R. v. Lurie*, [1951] 2 All E.R. 704.

Judgment

Reide J: The appellants in this case, Yusuf Omari and Mohamed Iddi Fusi, were charged on three counts in the alternative with:

- (1) obtaining a bus by false pretences contrary to s. 302 of the Penal Code, in that they obtained it by falsely pretending that Yusuf represented Upangwa Bus Service for the purpose of taking delivery of the said bus;
- (2) obtaining the bus by false pretences contrary to the same section, in that they induced the owner to deliver it to the Ukena Bus Service by falsely pretending that Yusuf represented the Upangwa Bus Service for the purpose of taking delivery; and
- (3) theft of the said bus contrary to s. 265.

They were acquitted on counts 1 and 3 and convicted on count 2. Each was sentenced to eighteen months' imprisonment, and it is against those convictions that they now appeal.

This judgment is concerned only with a submission of law which has been argued before me in limine, that is, whether the offence of obtaining goods by false pretences contrary to s. 302 is committed by a person who, by a false pretence, and with intent to defraud, induces any other person to deliver to any person anything capable of being stolen, but does so in circumstances in which the deliverer obtains a possession only of the thing, and not ownership.

The learned trial magistrate found, in effect, that an offence under the section was in this case so committed. I have already intimated that I propose in this judgment to find otherwise, and learned State Attorney having now informed me that the Attorney General does not intend to appeal against that finding, it will not be necessary for me to consider or deal with the other grounds put forward in the petition of appeal.

It is common ground that the complainant delivered his bus to the Ukena Bus Service under a hire purchase agreement and that the bus company thereby acquired possession but not ownership. Further, it is well established and is not in question that "obtains" in a charge of obtaining by false pretences means "obtains ownership", and that "to deliver" here means "to deliver possession of". "Delivery" is defined in the Sale of Goods Ordinance as "voluntary transfer of possession from one person to another", in Jowitt's Dictionary of English Law as "the actual transferring the possession of a movable thing from one person to another", and in Pollock on Possession as "Voluntary dispossession in favour of another".

In his judgment the learned trial magistrate said this:

"Mr. Dastur for accused 2 has pointed out that the accused persons at most were trying to obtain the bus on hire purchase and that they could not be criminally "obtaining" since the property in the vehicle did not pass on delivery under the Hire Purchase agreement, unless there was evidence of intent to deprive the owner of

the goods. He referred me to 10 Halsbury's Laws (3rd Edn.), at p. 828 in this respect and says there is no evidence of intent to deprive the owner of the vehicle. I will say that the evidence of

intent in this respect is not sufficiently strong to sustain a conviction for obtaining by false pretences. I therefore acquit both accused on count 1.

Turning to count 2 which is a charge of false pretences by inducing Kent to deliver the bus, Mr. Dastur's submission cannot apply here as the word "obtaining" is not used.

I am satisfied that accused 1 by falsely pretending that he was still Upangwa's representative for delivery purposes, induced Kent to deliver the bus to him with intent to defraud Upangwa Bus Service of its 3800/- credit. I find accused 1 guilty on count 2 as charged. As to accused 2 . . . His actions lead me to infer that he had aided or abetted the false pretence by accused 1. I therefore find him guilty on count 2 as a principal offender in terms of s. 22 (c) of the Penal Code."

As counsel for both appellants, has pointed out, the learned magistrate's findings of fact do not correspond with the particulars of the charge, since the latter allege that the false pretence was made for the purpose of inducing the delivery of the bus to the Ubena Bus Service, whereas the magistrate has found that the first appellant induced Kent to deliver the bus (not to the bus company but) to himself. That matter might have been a substantial point of appeal had the whole grounds of the appeal been before me for decision, but as I have explained, I need not now consider it.

Section 302 of the Penal Code provides that:

"Any person who by any false pretence, and with intent to defraud, obtains from any other person *any* thing capable of being stolen, or induces any other person to deliver to any person anything capable of being stolen, is guilty of a misdemeanour and is liable to imprisonment for three years."

The learned trial magistrate has construed the wording of s. 302 as creating two distinct modes in which the offence of obtaining goods by false pretences may be committed, that is:

- (1) by a person who by a false pretence and with intent to defraud, obtains from any other person anything capable of being stolen, and
- (2) by a person who, in similar circumstances induces any other person to deliver to any person any such thing.

Prima facie, the construction which the learned magistrate has put upon the wording of the section and which counsel for the Director of Public Prosecutions, has invited me to support, appears both logically and grammatically correct. Counsel has further submitted, though the matter is not one on which a decision is required in this case, that the words "any person" at their second appearance in the section should be construed as "any person other than the person charged". For reasons to which I will advert later, I think that the words "any person" are wide enough to include the person charged.

The appellant's submission, however, and that which I find must prevail, is that s. 302 must be read as a whole, and that when it is so read it must be construed as creating an offence of one character only, that is, one whereby ownership of property is obtained; and that the words "or induces any other person to deliver to any person" are merely intended to provide for a situation where the person charged obtains the ownership of anything for a third party by contriving a delivery either to himself or to someone else. To put the matter in a different way, the appellant's submission is that the effect of the second part of the section is to provide that the offence of obtaining goods by false pretences may be committed when anything is delivered to any person, and the property in it passes, not to the deliverer, but to someone else.

It is important to compare the wording of s. 302 with s. 32 of the Larceny Act, 1916, the relevant portion of which is as follows:

“False pretences – Any person who by any false pretence – (1) with intent to defraud, obtains from any other person any chattel, money or valuable security, or causes or procures any money to be paid, or any chattel or valuable security to be delivered to himself or to any other person for the use or benefit or on account of himself or any other person . . . shall be guilty of a misdemeanour and on conviction thereof liable to imprisonment for any term not exceeding five years.”

It will be seen that s. 302 of the Penal Code is, as it were, a simplified version of that part of s. 32 of the Larceny Act which I have quoted. The framework of the two sections is similar. The text of each section may be divided into two parts, the first being concerned with “obtaining” and the second with “delivery”. There are of course differences of phrasing. Section 302 speaks of “inducing any other person to deliver to any person”, while s. 32 speaks of “any person causing or procuring any chattel to be delivered to himself or any other person”, but I think it may be properly assumed that s. 302 has been modelled on the wording of s. 32, and accordingly that the wording and form of the two sections are so nearly alike that English decisions and authorities on the construction of s. 32 must be accorded great persuasive value in determining the correct construction of s. 302.

It is because of the phrase “to himself or any other person” in s. 32 that, as said earlier, I incline to think that the words “any person” on their second appearance in s. 302 should be construed as including the person charged.

Now at first blush, as I have said, the wording of s. 302 would appear to support counsel for the respondent’s submission. I attach no weight to the fact that the marginal note to s. 302 is “obtaining goods by false pretences” and that no mention is made there of delivery. The note is not a part of the section and should not be prayed in aid in interpreting it. One’s first doubts whether Mr. Troup’s submission can be supported arise however when one considers the two modes in which he says the offence may be committed, and which appear to be curious company for each other in a single section. They seem quite distinct offences and only distantly related in contemplation of law, one concerning the transfer of title and the other possession only.

I have not been able to find, and I have not been referred to any East African reported case where the question whether mere delivery can suffice to constitute an offence contrary to s. 302 has been canvassed, but the English authorities appear to be conclusive in favour of the appellant.

10 Halsbury’s Laws (3rd Edn.) says at p. 824, para. 1592, that one of the four essential ingredients of the offence of obtaining by false pretences is that “there must be an obtaining”. “Delivery” is not mentioned. At p. 827 of the same volume it is said that “the indictment must allege and the evidence must establish that the defendant . . . unlawfully obtained either a chattel, money or a valuable security . . .” Again no mention is made of “delivery”.

Kenny’s Outlines of Criminal Law (17th Edn.) has this to say at p. 325:

“For the purpose of s. 32 [of the Larceny Act] the word ‘obtains’ means that the offender has induced the prosecutor to transfer not merely the article itself but also the full ownership of the article . . . a bailment is not enough. If a bailment is obtained by false pretences this misdemeanour is not committed. An example is where the prisoner by false pretences obtained from a livery stable keeper a horse on hire for a third person and

rode it himself for the period of the hire, after which he returned it to the stables. What the prisoner had obtained was the ride and not ownership of the horse.”

The learned editor of Kenny comments that a mere bailment obtained by false pretences (which are what appear to be the circumstances of the present case) is no crime at all unless the bailee permanently appropriates the thing so as to commit the crime of larceny. The authority for that proposition is *R. v. Schweller* (1). The “livery stable” case is *R. v. Kilham* (2), in which it was held that since under a hiring agreement the property does not pass there can be no obtaining, and it may be noted that the court in that case did not go on to consider whether the offence of obtaining goods by false pretences could have been committed by a mere delivery of possession, as one would certainly have expected it to do, had that been a possible mode of committing the offence.

Kenny continues:

“Yet in *R. v. Boulton* the prisoner was convicted of obtaining by false pretences from a servant of the railway company a railway ticket for a journey by one of their trains; Pollock, C.B., said that the ticket, while in the hands of the party using it, was an article of value entitling him to travel without further payment, and the fact that it was to be returned at the end of the journey did not affect the question.

This judgment did not explain how the facts showed that the prisoner obtained the ownership of the ticket; and although it has been followed, the decision has been doubted, since it is plain that the real intent was to obtain the ride without paying for it . . . It has been repeatedly laid down that in this crime it is essential that ownership be obtained and that possession alone is not enough . . .”

The authority for the statement of the law contained in the final sentence of that extract is to be found in *R. v. Ball* (3) where Lord Goddard, C.J., said (35 Cr. App. Rep. at p. 27):

“There is no doubt that ‘obtains’ means obtaining the property and not merely possession.”

Ball’s case (3) was followed in *R. v. Lurie* (4). The facts in that case were that the appellant, with two other persons, was convicted of conspiring to cheat and defraud “such persons as might be induced to part with money and goods” to a limited company by false pretences and also to obtain cheques by false pretence from one N. The three defendants represented that the company was financially sound and was carrying on a prosperous business although they knew it was on the verge of bankruptcy. The cheques obtained by the appellant as the result of these false representations were made out to the company. The court held in that case that in s. 32 (1) of the Larceny Act the word “obtained” by false pretences meant “obtained the property and not merely the possession of the property”.

Counsel for the respondent has submitted that in none of the cases to which I have referred, was the question, whether delivery of a chattel to a third party might constitute an offence contrary to s. 32 of the Larceny Act, expressly before the court as an issue to be determined, and that therefore I am in a position to decide that question in this case, with reference to s. 302, free of persuasive authority. I am quite satisfied that this is not so, and that the English courts having, as Kenny puts it, repeatedly laid down that it is essential that ownership be obtained and not mere possession, the question whether something less than ownership would suffice to constitute the offence, has thereby been determined in the negative.

Those English cases are of great persuasive value, and by a parity of reasoning, I respectfully follow them in the present case, and allow the appeals. I understand that the appellants have already been released from custody.

Appeal allowed. Conviction quashed.

For the appellants:

W. D. Fraser Murray and P. R. Dastur, Dar-es-Salaam

For the respondent:

The Director of Public Prosecutions, Tanganyika

A. M. Troup (Senior State Attorney, Tanganyika)

Haji Ibrahim Tayeh v C H Yoe
[1964] 1 EA 167 (CAA)

Division:	Court of Appeal at Aden
Date of judgment:	16 January 1964
Case Number:	42/1963
Before:	Crawshaw Ag VP, Newbold and Crabb JJA
Sourced by:	LawAfrica
Appeal from:	The Supreme Court of Aden – Blandford, J.

[1] Rent restriction – Standard rent – Retrospective operation – Contractual rent agreed – Standard rent not assessed – Rent unpaid – Action by landlord – Defence that action premature as standard rent not assessed and when fixed operates retrospectively.

Editor's Summary

A landlord let certain premises at a contractual rent when the standard rent of those premises, which came into existence, subsequently to 1939, had not been fixed. The tenant having failed to pay, the landlord brought an action claiming the contractual rent to which the defence was that the tenant had applied for ascertainment of the standard rent and that the action should be stayed till then, on the ground that the landlord was not entitled to judgment for the contractual rent until the standard rent was ascertained. The judge gave judgment for the landlord and on appeal by the tenant it was submitted that the standard rent when ascertained operated retrospectively to the date on which either the Rent Restriction Ordinance commenced or the relevant premises came into existence.

Held –

- (i) there is nothing in any of the sections of the Rent Restriction Ordinance which require that the standard rent should operate retrospectively;
- (ii) (per Crawshaw, Ag. V.P.) the provisions of the Rent Restriction Ordinance regarding control of rent have no practical effect unless and until invoked by an application to fix the standard rent and the rent is actually fixed; accordingly the standard rent does not operate retrospectively.

Appeal dismissed.

Cases referred to in judgment:

- (1) *Ambalal Becharbhai v. Alawi*, [1958] E.A. 84 (C.A.).

The following judgments were read:

Judgment

Newbold JA: This appeal raises a short, but by no means easy, point of law. It is whether on a true construction of the Rent Restrictions Ordinance, Cap. 136 of the Laws of Aden, the standard rent of premises when ascertained by the Tribunal operates retrospectively to the date on which either the Ordinance commenced or the relevant premises came into existence.

The facts briefly are as follows: the respondent, whom I shall refer to as the landlord, let certain premises to the appellant, whom I shall refer to as the tenant, at a contractual rent. The standard rent of those premises, which came into existence, so far as is known, subsequent to 1939, had not been fixed. The contractual rent as agreed between the parties was not paid by the tenant. After a certain period the landlord brought an action claiming the contractual rent. The defence was that the tenant had applied for the standard rent to be ascertained, that it had not as yet been ascertained, and, therefore, that the action should be stayed, as until the standard rent was ascertained the landlord in law was not entitled to obtain judgment for the contractual rent. The learned judge who heard the case decided that that defence was of no avail and he gave judgment for the landlord. From that judgment the tenant has appealed.

The essential point is whether the standard rent, which we have been informed was fixed subsequent to judgment, does or does not apply retrospectively. Counsel for the tenant in this appeal, has urged that the whole tenor of the Ordinance is that the standard rent should be retrospective in operation and on this assumption he has referred to a number of sections which he says are entirely consonant with that point of view. Reference has also been made in the course of the appeal to a number of cases decided on legislation other than the Aden legislation. For myself I find those decisions of no assistance. It has been said and said frequently that decisions on the legislation of other countries is of little value unless the entire scope of that legislation is carefully studied, save of course when general principles are enunciated. I personally find that those decisions are of little assistance. Reference was also made to *Ambalal Becharbhai v. Alawi* (1), a decision of this court on the Aden legislation. Counsel for the appellant urged that the reference in this case to a notional standard rent applies equally well to the facts of this appeal as he urges there is always in existence a notional standard rent from the moment the Ordinance applies to premises. For myself I do not find the reference to a notional standard rent in the *Ambalal* case (1) to be of any assistance in this appeal. In that case there had been an argument as to what was the rent in 1939, and it was thus the duty of the court to ascertain that rent. The question was on what principles it was to be ascertained and the court said that such rent was to be ascertained on the basis of a notional economic rent. I find the decision of that case of no assistance in arriving at a conclusion as to whether the standard rent of premises which came into existence subsequent to the operation of the Ordinance is or is not to be retrospective in operation.

One has to ascertain the intention of the Ordinance from a general examination of its sections. I shall leave for the moment s. 2, which contains the very important definition of the words “standard rent”, and I shall go to s. 3. Counsel for the appellant has urged that this section shows an intention that there should be existing at all times a standard rent, which may not be ascertained until subsequently. That section says that the provisions of the Ordinance are to apply to all premises now in existence or thereafter coming into existence. It must be borne in mind that the Ordinance deals with two matters, the restriction of rent and also the control of eviction. Therefore even if there were no reference whatsoever to any restriction on rent, that section would still have to exist because, from the moment that the Ordinance comes into operation, control must exist according to the terms of the Ordinance in relation to the eviction of tenants. Thus the fact that the Ordinance applies to all premises is not of itself a real guide to the determination of the question whether the standard rent does or does not apply retrospectively. In any event an application for the determination of the standard rent has to be made in accordance with s. 5, and this application can only be made in respect of premises to which the

Ordinance applies; and that is thus another reason why s. 3 must apply to all premises.

I may say, to start off with, that when one starts to examine the legislation with a view to ascertaining whether or not a particular provision operates retrospectively, one must bear in mind the general rule of construction that in the absence of a clear intention legislation does not operate retrospectively.

I turn now to s. 2 which contains the definition of the words “standard rent”. It is as follows:

“... such rent as may be fixed in accordance with the provisions of this Ordinance by a Rents Tribunal established under those provisions or, where no such rent has been fixed, the rent at which such premises were let on December 3, 1939, plus 25 per cent. thereof;”

There is then a proviso which is of no importance. The thing to note in that definition is, first, that the standard rent means such rent as may be fixed, and, secondly, if no rent is fixed (thus envisaging the possibility that no standard rent is fixed) the rent which existed in 1939, if of course the premises existed in 1939. Therefore that definition in itself to my view, is if anything a clear indication that the standard rent is not always in existence and only waiting to be determined. The clear words of the definition are “such rent as may be fixed” and “if no rent is fixed” and these are phrases which militate against the concept of an ever existing notional standard rent.

I turn now to s. 5 which empowers the Rents Tribunal to fix a rent. Section 5 (1) is a general section and counsel for the appellant has drawn attention to the difference between the wording of s. 5 (1) and s. 5 (2). In sub-s. (2), which deals with the apportionment of a standard rent applying in relation to premises as a whole, there appear these words:

“... and the Rents Tribunal, after hearing the parties interested in such question, shall fix or revise the standard rent in respect of such premises and the rent so fixed or revised shall thereafter be the standard rent of the premises for the purposes of this Ordinance.”

Counsel for the appellant has pointed out that no such word as “thereafter” appears in sub-s. (1) and this is therefore, in his submission, a clear indication that any standard rent fixed under that subsection is to be retrospective in operation. I do not agree with that argument. Subsection (2) as counsel for the respondent points out, deals with a case where there already exists a standard rent which is being revised and therefore it has to be made quite clear that you cannot have two different standard rents in existence at the same time; thus the standard rent which is fixed under sub-s. (2) is stated to be the standard rent to be applied thereafter. I do not consider that the absence of that word from sub-s. (1) makes the standard rent as fixed under sub-s. (1) retrospective. There is nothing, as I see it, in the words of sub-s. (1) which require contrary to the general rule of the construction of statutes, that the rent so fixed should automatically operate retrospectively. One finds, time and time again, in the legislation of different countries, a power given to the Rents Tribunal in specific words to determine the date from which the standard rent shall apply, which date may be earlier than the date of the determination. No such words appear in the Aden Ordinance.

The next section to which counsel for the appellant refers is s. 7. He urged that the words “... any period after the commencement of this Ordinance ...” were a clear indication that the standard rent was to be retrospective. Again, with respect, I do not accept that argument because it is an argument which presupposes that the standard rent operates retrospectively; there is nothing

in the words which, without that presupposition require the standard rent to operate retrospectively. Those words are used in respect of the excess between the contractual rent and the standard rent and, quite obviously, if there is no standard rent in existence then those words can have no application as they refer to any period during which such an excess exists. That period can only be when the standard rent has been ascertained, and I do not see anything in any words in the section which requires me to hold, or which urge upon me the view that, the standard rent should operate retrospectively.

Counsel for the appellant also referred to s. 8 and he urged that unless the standard rent operated retrospectively this section could have little or no meaning. I do not accept that. It seems to me that s. 8 is equally applicable whether or not the standard rent operates retrospectively. In other words s. 8 comes into existence at the moment the standard rent comes into existence. Unless you start with the pre-supposition that the standard rent operates retrospectively there is nothing in s. 8 that requires that construction.

In order to determine, in order to arrive at a conclusion, that the standard rent operates retrospectively, the provisions of the sections must urge upon the court the requirement that the standard rent must operate retrospectively; and, as I have said, there is nothing in any of the sections or the definition to which I have referred which urge upon me the necessity of coming to the conclusion that it does not operate retrospectively.

I agree with what counsel for the appellant has said with respect to the judge's comments on the word "shall". With respect, I think the learned judge erred if he did come to that conclusion that the word "shall" is clearly used in a future sense. The word "shall" is almost always used in modern legislation in a mandatory sense. But this view of the judge made no difference to his conclusion.

For these reasons I see nothing in the provisions of the Ordinance which require me to come to the conclusion that the standard rent must operate retrospectively and I am therefore left with the general rule of construction that the court leans against a retrospective construction. As I have said, the sections to which reference has been made are consonant with a retrospective operation, but only if you start with a pre-supposition of retrospective operation. They are equally consonant with a prospective operation and thus do not require a retrospective operation. For these reasons, in my view, the standard rent does not operate retrospectively but only from the date when it is fixed unless it is fixed by reference to what existed in 1939.

For these reasons I would dismiss this appeal with costs.

Crawshaw Ag V: I agree with what Mr. Justice Newbold has said and with his construction of the Ordinance as a whole in respect of the control of rent. I do not propose to go into the sections of the Ordinance in any detail as he has already done so.

Section 3 of the Ordinance applies to all premises and so includes the present building which I understand was constructed after the introduction of this Ordinance, and certainly after 1939. Section 11, which relates to ejectment would therefore apply as soon as premises are let, but as I see it, and I think it is an important point, the provisions with regard to the control of rent do not have any practical effect unless and until the provisions of the Ordinance are invoked by an application for the fixing of the standard rent and by the actual fixing of that rent. In these circumstances there can be no retrospective effect of the standard rent unless one can read into the provisions of the Ordinance some clear indication that the Ordinance should be given such retrospective application. For the reasons given by Mr. Justice Newbold I do not think such indication can be read into the Ordinance.

Counsel for the appellant referred with some confidence to the case of *Ambalal Becharbhai v. Alawi Abdul Rehman Bahurmas* (1). I agree with Mr. Justice Newbold that that case has really no bearing on the considerations before us. In that case the property was in existence in 1939 and the court was concerned with the principles applicable to the assessment of the rent, and not with whether standard rent had retrospective effect. For the reasons which have been given by Mr. Justice Newbold and myself I would dismiss this appeal with costs.

I would mention that one has a real sympathy with the tenant in this case, and similar cases where owing presumably to administrative difficulties of the Rent Restriction Tribunal some considerable time must elapse before a standard rent is fixed.

Crabbe JA: I have also examined the relative provisions in the Rent Restrictions Ordinance with regard to the standard rent and I regret I am unable to agree with Counsel for the appellant's submissions that the standard rent when fixed operates retrospectively.

I am satisfied that the learned trial judge came to the right conclusion and I would also dismiss the appeal with costs.

Appeal dismissed.

For the appellant:

P. K. Sanghani, Aden

For the respondent:

R. K. Shah, Aden

Suleimani Muwanga v Walji Bhimji Jiwani and another [1964] 1 EA 171 (HCU)

Division:	High Court of Uganda at Kampala
Date of judgment:	10 March 1964
Case Number:	218/1963
Before:	Udo Udoma CJ
Sourced by:	LawAfrica

[1] *Fatal accident – Proper claimants – Deceased an African infant – Father dead but mother alive – Action by paternal uncle of deceased – Uncle by native custom guardian of deceased at father's death – Uncle responsible for upbringing and education of deceased – Uncle appointed successor to estate of deceased by custom – Whether action by uncle and mother under Law Reform (Miscellaneous Provisions) Ordinance, 1953, competent.*

[2] *Fatal accident – Damages – Deceased an African infant – Father dead but mother alive – Damages*

for loss of service to mother and grandparents.

Editor's Summary

The first plaintiff brought an action under s. 7 of the Law Reform (Miscellaneous Provisions) Ordinance, 1953, as personal representative of the deceased for the benefit of the estate and the mother of the deceased claiming damages for negligence resulting in the death of the deceased. During the hearing the plaint was amended and the mother was added as second plaintiff. The deceased, a school girl was 13 years old at her death. Her father had predeceased her and on his death the first plaintiff, who was the paternal uncle of the deceased, became her guardian according to custom and was responsible for her upbringing and education. After the death of the deceased according to custom the first plaintiff was appointed successor to the estate of the deceased and was the only person entitled to receive any dowry if the deceased had married. At the hearing it was submitted for the defendants that the action was not maintainable by the first plaintiff as he was not the proper person to have brought the action. Under s. 2 of the Ordinance the words "member of the family" has the same

meaning as in the Workmen's Compensation Ordinance and by s. 3 of the latter Ordinance "member of the family" under the paternal system is defined as including mother, father, wife or husband, daughter, sister, father's father and father's brother.

Held –

- (i) in the clan to which the deceased belonged the paternal system prevails and accordingly the first and second plaintiffs were members of the family of the deceased;
- (ii) under s. 8 of the Law Reform (Miscellaneous Provisions) Ordinance, 1953, the first and second plaintiffs were the rightful and lawful persons by and in whose name and for whose benefit the action should be brought; accordingly the action was well founded and maintainable;
- (iii) the court would take judicial notice of the fact that African children while at school are expected to assist in domestic work and after school on gaining employment to contribute towards the maintenance of the family; accordingly the mother and the girl's grandparents were entitled to damages for loss of service.

Judgment for the plaintiffs for Shs. 13,740/-.

Cases referred to in judgment:

- (1) *Finnegan v. Cementation Co. Ltd.*, [1953] 1 All E.R. 1130.
- (2) *Benham v. Gambling*, [1941] 1 All E.R. 7.

Judgment

Udo Udoma CJ: Originally Suleimani Muwanga was the only plaintiff in this case. He had brought the action as the personal representative of Nowerina Namayanja deceased for the benefit of both the estate and the mother of the deceased. On February 21, 1964, in the course of the hearing, counsel for the plaintiff applied for, and was granted leave by the court, under Order 1, r. 10 (2) of the Civil Procedure Rules, to amend the plaint filed by adding thereto as second plaintiff the name of the mother of the deceased, Tativa Namubiru. The plaint was accordingly amended.

In this judgment, consequential upon the amendment of the plaint, Suleimani Muwanga and Tativa Namubiru shall hereinafter be referred to as 1st and 2nd plaintiffs respectively.

The claim is for damages for negligence resulting in the death of the deceased, Nowerina Namayanja. It is brought under Part II s. 7 of the Law Reform (Miscellaneous Provisions) Ordinance No. 23 of 1953.

The deceased, Nowerina Namayanja, before her death was a school girl. She was attending school at Mitala Maria, a Catholic school. She was in Standard VI at the time of her death. She met her death as a result of a collision which occurred on March 18, 1962, between two vehicles, a Volkswagen bus No. URK 792, the property of the first defendant, and an Albion Omnibus No. URU 176, the property of the second defendant. It is not in dispute that the two vehicles were driven by servants of the first and second defendants respectively.

The case of the plaintiffs is that the deceased was at the time of her death of the age of 13 years. She was born on March 6, 1950. The second plaintiff, Tativa Nambiru, (P.W.3), was the mother of the

deceased, and the first plaintiff her uncle, being the brother of the deceased's father, Francisco Kyeyune, who died about four years after the birth of the deceased. On the death of Francisco

Kyeyune the 1st plaintiff became the guardian of the deceased and as such was responsible for looking after her and for her education. He was according to local custom entitled also to be paid and to receive dowry if the deceased married. It was the first plaintiff who paid Nowerina Namyanja's school fees regularly while she was a pupil in the Mitala Maria Catholic school.

When the deceased died, it was the first plaintiff who was responsible for her burial and for all funeral expenses incurred, which amounted to Shs. 640/-. It was the first plaintiff who buried her. According to custom the first plaintiff was in March, 1962, after Nowerina Namyanja's death, appointed to succeed to her estate by the sub-clan head, Ernest Baziwane (P.W.I).

The fatal accident complained of took place on March 18, 1962, at Nabusanke in front of a petrol station on the Kampala/Masaka Road.

That morning at about 7 a.m., it is the plaintiff's case that the deceased, together with a number of other girls, including two Catholic Reverend Sisters, had left Mitala Maria and were travelling to Bualasa on the Kampala/Masaka Road. All the girls and Sisters were travelling as passengers in a Volkswagen bus No. URK 792, the property of the first defendant. At Nabusanke the driver of the Volkswagen bus, who was travelling on the left-hand side of the road as one faces Masaka from Kampala, decided to turn into a petrol station on the opposite side of the road for the purpose of buying petrol. At that time there were other vehicles, including the Albion Omnibus No. URU 176, following behind the Volkswagen bus on the same side of the road. Traffic on the road was heavy.

The driver of the Albion Omnibus No. URU 176 sounded his horn, at the same time clearing to the right-hand side of the road with a view to overtaking the Volkswagen bus. The driver of the Volkswagen bus, who, also almost immediately indicated by pointing with his hand thrust out of the window of the Volkswagen that he was turning into the right side of the road towards the direction of the petrol station, slowed down his bus and thereupon, still driving, turned towards the petrol station.

The Volkswagen bus, in thus turning, was attempting to cross from the left-hand side of the road to the right-hand side of the road just at the same time as the Albion Omnibus was clearing to the right side of the road with the view to overtaking the Volkswagen bus. As the Volkswagen bus was about to enter into the petrol station, it was hit from behind by the Albion Omnibus, both vehicles being then on the right-hand side of the road. The result was that the Volkswagen bus somersaulted and fell into a nearby ditch about 17 ft from the road in front of the petrol station. It was completely damaged. The omnibus finally stopped on the right-hand side of the road opposite the station. Its right side headlamp was broken and there was a dent near the broken headlamp. In the course of the Volkswagen bus somersaulting and before it fell into the ditch, the deceased was catapulted out of the window of the Volkswagen bus and thrown onto the ground in front of the petrol station. She was seriously injured and was bleeding. That was at about 7.45 a.m. The deceased was later removed unconscious and taken to the Nkozi hospital but died as soon as she arrived at the hospital.

At the hearing neither the first defendant nor the driver of the vehicle, URK 792, gave evidence. For the second defendant the driver of the Albion Omnibus, No. URU 176, was called. In his evidence he says that when he saw the driver of the Volkswagen bus putting out his hand and turning at the same time to the right-hand side of the road, to which he himself was clearing his vehicle with the intention of overtaking the Volkswagen bus, he had immediately applied his brakes, but that even though he was travelling at 25 miles per hour then, the bus could not stop. It collided with the Volkswagen bus.

Under cross examination, he admitted that when he attempted to overtake the Volkswagen bus the driver of the Volkswagen bus had not signalled to him to overtake him; that immediately on showing his hand the driver of the Volkswagen bus had turned suddenly to the right-hand side of the road, whereby the omnibus collided with it.

From the pleadings and the evidence thus briefly summarised and the submission of counsel, and as the action is brought under the Law Reform (Miscellaneous Provisions) Ordinance 1953, three issues would appear to fall for determination by the court, namely:

1. Is this action maintainable by the plaintiff?
2. (a) Who as between the two defendants was negligent?
(b) Were the two defendants equally or proportionately negligent? and
(c) If proportionately, in what proportions? And
3. What damages, if any, are recoverable by the plaintiffs?

I propose to attempt to answer these questions seriatim in the light of the evidence before the court and the submission by counsel for the plaintiffs and the defendants.

As regards the first question, on the evidence I find that the first plaintiff was the uncle, that is, the brother of Nowerina Namayanja's father, by the name of Francisco Kyeyune; that Francisco Kyeyune was the same person referred to by Ernest Baziwane (P.W.1) as Francisco Kizitu in his evidence; that since the death of Francisco Kyeyune, the first plaintiff was, according to custom, the guardian of Nowerina Namayanja and in that capacity looked after her and was responsible for her education, and actually paid her school fees all the time she was at Mitala Maria Catholic school until her death on March 18, 1962; that also according to custom the first plaintiff was the one person entitled to any dowry that would have been paid if Nowerina Namayanja had been married.

I accept the evidence of the plaintiffs and their witness, Ernest Baziwane (P.W.1), that the first plaintiff was according to custom duly appointed successor to the estate of the deceased by Ernest Baziwane (P.W.1) in March, 1962, and that the first plaintiff is the only person responsible to administer the estate of the deceased. I am satisfied that the deceased did, and that Ernest Baziwane (P. W. 1) and the first plaintiff belong, to the Nyonyi Clan of Buganda; that Ernest Baziwane (P.W.1) is the sub-clan head of the Nyonyi Clan, and that as such clan head he is by custom the only one entitled to appoint successors to the estate of deceased persons. From those findings, I draw the only reasonable and irresistible inference that the clan referred to as "Fumbe" by Ernest Baziwane (P.W.1) is the same as "Nyonyi" Clan, as on the evidence no other clan could have been meant. I place great reliance on the evidence of the mother of the deceased, Tativa Namubiru (P.W.3), whom I am satisfied is a witness of truth.

Under s. 2 of the Law Reform (Miscellaneous Provisions) Ordinance, 1953, it is provided that "member of the family" has the same meaning as under the Workmen's Compensation Ordinance. The provisions of s. 3 of the Workmen's Compensation Ordinance, Cap. 91, defines "members of the family" when used in relation to an African as:

"any of those persons mentioned in the 1st Schedule hereto according as the family is based on the paternal or maternal system."

The First Schedule to the Workmen's Compensation Ordinance defines "member of the family" under the paternal system as including mother, father, wife or husband, daughter, sister, father's father and

father's brother.

There is no evidence as to the particular system applicable to the Fumbe or Nyonyi Clan. But the inference I draw from the evidence of the deceased's

mother, Tativa Nambiru (P.W.3) that she does not belong to the Nyonyi Clan and that is why she was able to marry into it by marrying the father of the deceased that the system of marriage is exogamous; and that it is the paternal system which prevails in the Nyonyi Clan. I hold, therefore, that the first and second plaintiffs are members of the family of the deceased, Nowerina Namayanja, and therefore entitled to, and are by the terms of the provisions of s. 8 of the Law Reform (Miscellaneous Provisions) Ordinance No. 23 of 1953, the rightful and lawful persons by and in whose name and for whose benefit this action should be brought. That being so, I am of the opinion that the action is well founded and maintainable. I, therefore, reject as lacking in substance the submissions of the counsel for the first and second defendants that the action has been wrongly constituted.

In my view the case of *Finnegan v. Cementation Co. Ltd.* (1), which was cited and relied upon by counsel for the second defendant in his submission that the first plaintiff is not the proper person to have brought this action is irrelevant and inapplicable to the circumstances of this case. It is distinguishable from the circumstances of the present case in that the issue of representation raised cannot be decided on the principles of English Law or on the provisions of English Statutes. It can only be determined by the statutory provisions contained in s. 8 of the Law Reform (Miscellaneous Provisions) Ordinance, to which this court must give effect.

The decision in *Finnegan v. Cementation Co. Ltd.* (1), was based on the construction of s. 2 of the English Fatal Accidents Acts, 1846. There the widow of a workman, who died on January 22, 1952, as the result of an accident, which he had suffered while in the employ of the defendant company, obtained in Ireland a grant of Letters of Administration of his estate. She did not obtain a grant of administration in England. On June 10, 1952, she commenced an action in England against the defendants on behalf of her husband's dependants for damages under the Fatal Accidents Act in respect of his death. The indorsement of the writ stated that her claim it was "as administratrix of the estate of her husband. In the statement of claim it was stated that "the plaintiff is the widow and administratrix" of the deceased man.

On February 12, 1953, the defendant issued a summons asking that the writ and all subsequent proceedings be set aside on the ground that the plaintiff had no title to administer her husband's estate in England. It was held that the fact that the plaintiff had obtained Letters of Administration in Ireland did not constitute her an administratrix for the purposes of s. 2 of the Fatal Accidents Act, 1846, and therefore that she was not entitled to sue as such. And further that even if it were legitimate to read the writ and statement of claim together the effect of these documents so read was that the plaintiff was purporting to sue in the representative capacity of administratrix of her husband's estate, and that as she had no title to sue as her husband's executrix, the writ must be set aside.

It will be seen that that decision was based on the construction of s. 2 of the Fatal Accidents Act, 1846, of England which has no application to the case under consideration.

I turn now to consider the issue of negligence, and I start by stating that in my judgment both the Volkswagen bus, No. URK 792, and the Albion Omnibus No. URU 176 were on the evidence negligent. The driver of the Volkswagen bus was negligent in cutting across from the left-hand side to the right-hand side of the road with a view to entering into the petrol station without, I find, keeping any lookout and making certain that the road was clear. I am satisfied that he did not make use of his mirror. I find also that the driver did not have any

regard for the traffic on the road at the time, and that he failed to give sufficient warning of his intention to turn to his right side of the road. The driver had certainly no regard for the safety of other users of the road.

I accept the evidence of Sister Maria Ponsiano (P.W.5) that at the time when the driver of the Volkswagen bus turned to go into the petrol station there were other vehicles following behind. I find that by the driver of the Volkswagen bus turning as he did, he was, in the circumstances of this case, driving his vehicle in a most dangerous manner across the road.

It is clear on the evidence that the driver of the omnibus was also not keeping a proper lookout while attempting to overtake the Volkswagen bus; for, if he did, he would have seen clearly in time to slow down his vehicle when the driver of the Volkswagen bus put out his hand indicating that he was turning to the right side of the road. I am of the opinion that if, on the other hand, the driver of the omnibus did keep a lookout, he must have been travelling at such a speed, which I consider unreasonable in the circumstances of this case, which probably accounts for his inability to bring his bus to a stop in time to avoid the collision. There is no suggestion that the brakes of the omnibus were not active.

I think it is not unreasonable to assume that the driver of the omnibus must have accelerated the speed of his bus in an attempt to overtake the Volkswagen bus immediately on sounding his horn and clearing to the right side of the road. On his own admission there was no signal from the Volkswagen bus for him to overtake it. In overtaking as he did, I find that he was driving so dangerously as not to have regard to the safety of other users of the road, having regard to his admission that traffic was heavy on the road. I find also that the road was straight and clear; that it was a tarmac road; and that the accident took place on the right-hand side of the road as one faces Masaka from Kampala.

On these findings, and, in all the circumstances of this case, I draw the inference and conclude that the two drivers were equally to blame, and that the damages to which the plaintiffs are entitled should be apportioned accordingly. That brings me to a consideration of the issue of damages.

The damages claimed in this case are in respect of:

- (a) pain and suffering shs. 500/-;
- (b) loss of expectation of life;
- (c) funeral expenses amounting to shs. 640/-; and
- (d) loss of service.

From counsel for the plaintiffs' submission it was not clear whether he was abandoning his claim in respect of item (c) – funeral expenses. He had submitted almost somehow accepting counsel for the second defendant's contention that only a beneficiary in an action under the Law Reform (Miscellaneous Provisions) Ordinance who is entitled to recover funeral expenses, and appeared to give the impression that the first plaintiff was not a beneficiary. Finding as I do, that the first plaintiff is a beneficiary, I hold that he is entitled to recover the sum of shs. 640/-, which I find had been expended by him in connection with the funeral of the deceased. I am satisfied that he should recover this amount under s. 12 of the Law Reform (Miscellaneous Provisions) Ordinance, 1953.

I agree with counsel for the plaintiffs' submission that on the authority of the decision in the House of Lords in *Benham v. Gambling* (2) the practice prevailing in England is not to award more than £200 in respect of loss of expectation of life in the case of a child however promising, and that the assessment of damages for loss of expectation of life should not be made upon actuarial basis, but by fixing upon

common sense principles of a reasonable figure for the loss of prospective happiness.

It must also however be remembered and appreciated that decisions of English courts on quantum of damages can hardly be of assistance to the courts of this country. The standard of life in England is altogether different from that obtaining in this country. I think it is right also that the court should take judicial notice of the fact that African children are usually educated by their parents and guardians at considerable expense involving more often than not great personal sacrifice. Such children are naturally in turn expected to assist in domestic work while at school, and after school on gaining employment, to make contribution towards the maintenance of the family, the term family being used here, not in the European sense, but in the African sense, which anthropologists usually refer to as the kindred or extended family. In which case it seems to me to be nothing strange that the deceased should have been said to have been serving not only her mother but also her grand-parents when she was alive.

On common sense principles, I think it is not unreasonable to award, and I do now award, the plaintiffs for the loss of expectation of life the sum of Shs. 5000/-; and for the loss of services by the deceased's mother, the second plaintiff, the sum of Shs. 5400/- calculated at Shs. 75/- per mensem for six years; and by the grandparents at half that rate, which amounts to Shs. 2700/-. I accept Tativa Namubira's (P.W.3) evidence that if she had had to employ a servant to do the work which was done by the deceased for her, it would have cost her Shs. 75/- per mensem. I am satisfied that the deceased was serving not only the mother but also her grandparents and that if even she had to train as a nurse she would still have had to serve them any time she came home in addition to her financial contributions.

I will make no award in regard to head (a) for pain and suffering, because I am satisfied that immediately after the accident, the deceased was unconscious. She was removed and taken to hospital in that state and died immediately on admission. There is no evidence that she was even able to speak to anybody after the accident, and that she could ever have been conscious of any pain.

In the result there will be judgment for the plaintiffs for the total damages of Shs. 13,740/- and interest at six per cent. per annum against the first and second defendants, the total damages to be apportioned equally between the first and second defendants, each bearing a moiety thereof, that is, fifty per cent. of the amount awarded. I would also award the plaintiffs costs of this action. Order accordingly. Costs to be borne equally by both defendants.

Judgment for the plaintiffs for Shs. 13,740/-.

For the plaintiff:

Ponda & Asaria, Kampala

V. N. Ponda

For the first defendant:

Mayanja Clerk & Co., Kampala

A. V. Clerk

For the second defendant:

Parekhji & Co., Kampala

Y. V. Phadke

Republic v Sefu Said
[1964] 1 EA 178 (HCT)

Division: High Court of Tanganyika at Dar-es-Salaam
Date of judgment: 14 August 1963
Case Number: 116/1963
Before: Biron J
Sourced by: LawAfrica

[1] Criminal law – Wrongful confinement – Ingredients of offence – Complainant handcuffed but not confined within building or place – Whether wrongful confinement synonymous with false imprisonment under law of England.

Editor's Summary

The respondent asked the complainant for some liquor and, being refused, apparently arrested and handcuffed her. The respondent then took her to the house of the local court clerk, and being unable to find the local magistrate, he asked for the keys of the lock-up. The court clerk said he had no keys whereupon the respondent took the complainant towards her house and on the way removed the handcuffs and allowed her to go home. The respondent having been charged with wrongful confinement contrary to s. 253 of the Penal Code, the magistrate held that there was a distinction between wrongful confinement and false imprisonment and that wrongful confinement involved confinement within the confines of some building or place such as an enclosed courtyard and that since the respondent had not so confined the complainant he must be acquitted. On appeal by way of case stated,

Held –

- (i) the offence of wrongful confinement under s. 253 of the Penal Code corresponds to the offence of false imprisonment under the law of England;
- (ii) to establish the offence of wrongful confinement, it is sufficient to prove that there was an unlawful and total restraint of the personal liberty of another, whether by detaining him against his will in a particular place or by constraining or compelling him to go to a particular place; it need not be proved that he was confined within the confines of some building, structure or a place such as an enclosed courtyard;
- (iii) the facts as established constituted the offence of wrongful confinement contrary to s. 253 of the Penal Code.

Appeal allowed. Order of acquittal set aside. Case remitted to the magistrate with direction to convict accused of offence charged.

Cases referred to in judgment

- (1) *Pocock v. Moore* (1825), 171 E.R. 1034.
- (2) *Bird v. Jones* (1845), 7 Q.B. 742; 115 E.R. 668.
- (3) *Parankusam Pantulu v. Stuart* (1865), 2 M.H.C.R. 396.
- (4) *R. v. Said Mshangama* (1945), 7 Z.L.R. 81.

Judgment

Biron J: This is an appeal by way of case stated brought by the Republic from the ruling and consequent acquittal by the Dodoma district court on a charge of wrongful confinement, contrary to s. 253 of the Penal Code.

The facts as found, which incidentally are not in dispute as the accused, apparently at the close of the trial but before judgment, changed his plea to one of guilty, are set out in the ruling as follows:

“The facts appear to be that the accused asked the complainant for some liquor, and he being refused apparently arrested the complainant and handcuffed her. He took her walking to the house of the local court clerk, and then not being able to find the local court magistrate, he asked for the keys of the lock-up. The clerk said he had no keys and suggested that the accused was to go to a messenger. After a further abortive search at the dispensary the accused took the lady back towards her house. On approaching a certain house the accused got water and soap and removed the handcuffs. The lady was allowed to go home. It seems therefore that the lady was never detained in any place apart from being handcuffed.”

The learned magistrate then went on to consider whether these facts constitute the offence of wrongful confinement within the meaning of s. 253 of the Penal Code, which reads:

“Whoever wrongfully confines any person is guilty of a misdemeanour and is liable to imprisonment for one year or to a fine of three thousand shillings.”

He stated:

“The normal meaning of confinement as stated in Chamber’s Dictionary is ‘the state of being shut up’. The shorter oxford dictionary seems to describe it as imprisonment. It would appear therefore that the basic meaning of wrongful confinement would be, that the person confined must be within the confines of some building, structure or perhaps place such as an enclosed courtyard.

There does not seem to be an exactly similar offence under English law. The nearest offence would be false imprisonment. Archbold describes this as follows:

‘False imprisonment is the unlawful and total restraint of the personal liberty of another, whether by constraining him or compelling him to go to a particular place, or by confining him in prison, police station or private place, or by detaining him against his will in a public place.’

As this is also a civil wrong I shall quote the definition of false imprisonment as set out in Clerk and Lindsell on Torts, 6th Edn. at pp. 206 and 207.

‘A false imprisonment is complete deprivation of liberty for the time being without lawful cause. The prisoner may be confined within a definite space by being put under lock and key, or his movements may simply be constrained by the will of another . . .

If there is authority to confine a prisoner in one place and he be confined in another, this is wrongful confinement. In *Cobbett and Grey* the plaintiff being in custody as an insolvent had been improperly removed to a wrong part of the prison and confined among a wrong class of prisoners. The majority of the court held that this was a trespass.’

In my view these authorities draw the distinctions between examples of false imprisonment. As its name suggests false imprisonment may be where a person is kept in a prison or a police station or a private place. But false imprisonment extends beyond confinement to cases of arrest before the person has reached any place. It seems to me to be a much wider concept than that of wrongful confinement. In each of these authorities confinement is illustrated by circumstances in which the word confinement is used in its natural use.

In interpreting the present section of the Penal Code, I am asked to give

the words wrongful confinement, the same meaning as false imprisonment. This would cause me to use the word confinement in what appears to me to be an unnatural sense. False imprisonment is a well-known term, I have no doubt that its wide scope was well known to the framers of the Penal Code. They have not chosen to create an offence of false imprisonment and therefore I suppose them to have intended to create a more restricted offence; that of wrongful confinement. The section can be given a meaning by interpreting the words naturally, which gives it proper scope in certain circumstances. It is a well-known rule of interpretation that in a penal statute the interpretation of its provisions should be strict and not extended beyond the natural meaning of the words.

It follows therefore that in my view the accused did not confine the lady within the natural meaning of the word confine. He may have assaulted the lady, or he may be liable to pay civil damages for false imprisonment. But he is not guilty of this offence so far as I am aware. I therefore acquit and set him free."

The formal case stated as set out in accordance with the provisions of s. 341 of the Criminal Procedure Code, gives as "the question of law submitted by the Director of Public Prosecutions for the opinion of the High Court:

"Whether to establish the offence of wrongful confinement contrary to s. 253 of the Penal Code it is not sufficient to prove that there was an un-lawful and total restraint of the personal liberty of another whether by constraining or compelling him to go to a particular place or by detaining him against his will in a public place but that it must also be proved that he was confined within the confines of some building, structure or perhaps place such as an enclosed court-yard"?

In so far as the ordinary meaning of the term "confinement" is concerned, I do not share the learned magistrate's difficulty in equating "confinement" with "imprisonment". The learned magistrate has referred to the definition in the Shorter Oxford Dictionary. "Confinement" there is defined as:

"(1) the action of confining; being confined; imprisonment."

"Imprisonment" is defined as:

"The action of imprisoning, or fact or condition of being imprisoned; confinement, incarceration."

Likewise in Webster's Dictionary "confinement" is defined as:

"Act of confining, state of being confined; restraint within limits, imprisonment; any restraint of liberty; restriction."

And "imprisonment" in turn is defined as:

"Act of imprisoning, or state of being in prison; confinement; restraint."

The two terms "imprisonment" and "confinement" would thus appear to be synonymous. With regard to the inference drawn by the learned magistrate from the use of "confinement" in the contexts quoted, with respect, I think the meaning of the passages would not in the least be altered if, though offending as tautologous, "imprisonment" were substituted for "confinement".

It is clear from the learned magistrate's ruling that had the charge been laid as false imprisonment, he would on the facts have had no difficulty in convicting. The learned magistrate has already quoted the relevant passage from Archbold to the point. Russell on Crime, (11th Edn.), p. 766, likewise defines false imprisonment as:

“False imprisonment is unlawful and total restraint of the personal liberty of another, whether by constraining him or compelling him to go to a particular place or by confining him in a prison or police station or private place or by detaining him against his will in a public place.”

It is only necessary to cite two cases in support of these definitions of the offence. In *Pocock v. Moore* (1), 171 E.R. 1034, where:

“The defendant had sent for a constable, and directed him to take the plaintiff on a charge of felony. The constable said, ‘You must go with me’, on which the plaintiff said, ‘he was ready to go’, and actually went with the constable towards a police-office, without being seized or touched by the constable. On his way he attempted to escape, on which the constable seized him, the defendant not being present;”

it was held by Lord Abbott C.J. that:

“I am of the opinion, that if a person send for a constable, and give another in charge for felony, and the constable tell the party charged that he must go with him, on which the other, in order to prevent the necessity of actual force being used, expresses his readiness to go, and does actually go, this is an imprisonment, and gives the party thus consenting to go, an action of false imprisonment. Then, as every imprisonment includes an assault, the plaintiff may recover on the count for a common assault.”

In *Bird v. Jones* (2) where the facts were not the same, Coleridge J., after reviewing the authorities, in an oft quoted passage, said (115 E.R. at p. 670):

“So, if a person should direct a constable to take another in custody, and that person should be told by the constable to go with him, and the orders are obeyed, and they walk together in the direction pointed out by the constable, that is, constructively, an imprisonment, though no actual violence be used. In such cases, however, though little may be said, much is meant and perfectly understood. The party addressed in the manner above supposed feels that he has no option, no more power of going in any but the one direction prescribed by him than if the constable or bailiff had actually hold of him: no return or deviation from the course prescribed is open to him. And it is that entire restraint upon the will which, I apprehend, constitutes the imprisonment.”

As very rightly remarked by the learned magistrate, there is no specific offence of false imprisonment in our Code. The question is, whether the offence of wrongful confinement in our Code corresponds to and should be construed the same, as false imprisonment in English law. The learned magistrate, in the passage above quoted, said:

“False imprisonment is a well-known term, I have no doubt that its wide scope was well known to the framers of the Penal Code. They have not chosen to create an offence of false imprisonment and therefore I suppose them to have intended to create a more restricted offence; that of wrongful confinement.”

With respect, I fail to see any reason why the learned magistrate should so want to restrict the offence. Section 253 in our Code, which deals with wrongful confinement, is derived and taken verbatim, in so far as the relevant portion of the section, is concerned, from s. 342 of the Indian Penal Code. In the Indian Code however, wrongful confinement is defined in s. 340 as:

“Whoever wrongfully restrains any person in such a manner as to prevent

that person from proceeding beyond certain circumscribing limits, is said 'wrongfully to confine' that person."

Gour, in his Commentary on the Indian Penal Code, (2nd Edn.), states (at p. 1544 para. 3316):

"The two offences described in this (section 339) and the next section (340) are instances of what is designated 'false imprisonment' in English law."

Section 340 has already been set out. Section 339 reads:

"Whoever voluntarily obstructs any person so as to prevent that person from proceeding in any direction in which that person has a right to proceed, is said wrongfully to restrain that person."

In commenting on s. 340, GOUR states (at p. 1551 para. 3337):

"A policeman may, for example, intimate to a person that he must consider himself as in his custody. He may not touch his person, or use any force at all. It is enough, for the other knows the consequence of disobedience. In this sense moral force may do the work of physical coercion, which is then unnecessary. Such was the case of the Police Superintendent who wrote to the plaintiff to proceed to and appear before the court of a certain magistrate, at the same time sending two constables to see that he spoke to no one, and in which case the arrest was held to be complete as confinement, because there was the moral persuasion backed up by physical force to be put in use if necessary".

The case cited for this proposition is that of *Parankusam Pantulu v. Stuart* (3), where it was held, and I quote from the headnote:

"The retaining of a person in a particular place, or the compelling him to go in a particular direction by force of an exterior will overpowering or suppressing in any way his own voluntary action, is an imprisonment on the part of the person exercising that exterior will."

The relevant passage from the judgment reads as follows:

"The case against the first defendant is a very different one; and it being conceded that if the plaintiff was in custody, the custody was not lawful, the only questions are: whether first defendant imprisoned the plaintiff, and if so, what damages ought to be awarded. In this case it cannot be doubted, upon the facts, that the plaintiff was directed to go to Rassulkonda, and that the presence of the constables, who followed or accompanied him, rendered it by no means a matter of option whether he would go or not. It is manifestly not necessary to constitute imprisonment that there should be a continuous application of superior force. In the felicitous language of Mr. Justice Coleridge, 'it is one part of the definition of freedom to be able to go wither-soever one pleases, but imprisonment is something more than the mere loss of this power: it includes the notion of restraint within some limits defined by a will or power exterior to our own'. Mr. Justice Williams, in his judgment, puts a case almost precisely similar to the present as an example of imprisonment. It is quite clear, therefore, from the full discussion which the subject received in that case, that the retaining of a person in a particular place, or the compelling of him to go in a particular direction by force of an exterior will overpowering or suppressing in any way his own voluntary action, is an imprisonment on the part of him who exercises that exterior will. That the Superintendent of Police, by his letter, enforced as it was by

the company of two constables, put that stress upon the plaintiff's will, there exists no question."

It may, however, be contended, not without reason or substance, that the case is concerned with the tort of false imprisonment and not the offence of wrongful confinement. However, it is abundantly clear that Gour at least considered the two offences, false imprisonment and wrongful confinement, to be synonymous.

Section 342 of the Indian Penal Code is also the source of s. 250 (as it then was) of the Zanzibar Penal Decree. In considering and ruling on the sections. Sir John Gray C.J. in *R. v. Said Mshangama* (4) said (7 Z.L.R. at p. 89):

"The language of section 250 of the Penal Decree is the same as that of s. 342 of the Indian Penal Code, but the definition of 'wrongful confinement' which appears in s. 339 of the Code is not reproduced in the Decree. Indian decisions on the interpretation of s. 342 of the Indian Penal Code are not therefore necessarily applicable in the interpretation of s. 250 of the Penal Decree. The rules as to the interpretation of the words 'wrongfully confines' in the latter section are those laid down in s. 3 of the Penal Decree.

In *Mogul Steamship Co. v. McGregor* (1889), 23 Q.B.D. 598 at p. 612 Bowen L.J. said: 'The terms "maliciously", "wrongfully" and "injure" are words all of which have accurate meanings, well known to the law, but which also have a popular and less precise signification, into which it is necessary that the argument does not imperceptibly slide . . . The term "wrongful" in its turn imports the infringement of some right'. Those words were cited with approval by Lord Watson in the later case of *Allen v. Flood*, [1898] A.C. 1 at p. 93. The word 'confine' does not appear ever to have received a judicial interpretation. It must be presumed therefore to have its ordinary meaning in the English language.

From the foregoing it appears to me that 'wrongful confinement' is closely akin to the civil tort of false imprisonment, which, it should be observed, is also a misdemeanour at common law. (Archbold, Criminal Pleading (1943) p. 1002). In this connection it may be observed that an unlawful imprisonment may also amount to a common assault and that the restraint imposed upon the person imprisoned need not necessarily be violent (*Hunter v. Johnson* (1884), 13 Q.B.D. 225). In this case I am satisfied that the facts disclose grounds for an actionable claim for false imprisonment, despite the fact that, if she had been aware of the possibility, the prosecutrix might have made her escape through the window. 'Every confinement of a person (according to Blackstone 3 Bl. C. 127) is an imprisonment whether it be in a common prison or in a private house . . . It is that entire restraint upon the will which, I apprehend, constitutes the imprisonment' (per Williams J. in *Bird v. Jones* (1845) 7 Q.B. 742). Here, the evidence shows that the prosecutrix was just as effectively restrained for the time being as if she had been placed in confinement in an actual prison and I have no hesitation in holding that this amounted to a wrongful confinement punishable under s. 250 of the Penal Decree."

Section 3 of the Penal Decree referred to, is the same as s. 4 of our Penal Code, which reads:

"This code shall be interpreted in accordance with the principles of legal interpretation obtaining in England, and expressions used in it shall be presumed, so far as is consistent with their context, and except as may be otherwise expressly provided, to be used with the meaning attaching to them in English criminal law and shall be construed in accordance therewith."

Although the facts in the Zanzibar case were not on all fours with this instant case, Sir John Gray's ruling is, to my mind, authority for the proposition that the offence of wrongful confinement is so closely 'akin' to false imprisonment that the same construction as is put on false imprisonment should be applied to wrongful confinement. Nor does there appear to be any reason for distinguishing in so far as the constituent ingredients are concerned, between the tort of false imprisonment and the offence of wrongful confinement.

In all the circumstances, I consider that the offence of wrongful confinement in our Code corresponds to the offence of false imprisonment under English law. I therefore answer the question submitted:

"Whether to establish the offence of wrongful confinement contrary to s. 253 of the Penal Code it is not sufficient to prove that there was an unlawful and total restraint of the personal liberty of another whether by constraining or compelling him to go to a particular place or by detaining him against his will in a public place but that it must also be proved that he was confined within the confines of some building, structure or perhaps place such as an enclosed court-yard"?

that to establish the offence of wrongful confinement, it is sufficient to prove that there was an unlawful and total restraint of the personal liberty of another, whether by detaining him against his will in a particular place or by constraining or compelling him to go to a particular place, and it need not be proved that he was confined within the confines of some building, structure, or place such as an enclosed courtyard.

I therefore uphold the submission of the Republic that the facts as established in this case constitute the offence of wrongful confinement, contrary to s. 253 of the Penal Code. The finding of not guilty by the learned magistrate is accordingly quashed and the order of acquittal is set aside.

The proceedings are returned to the trial court with a direction to convict the accused of the offence of wrongful confinement contrary to s. 253 of the Penal Code, as charged.

Appeal allowed. Order of acquittal set aside. Case remitted to the magistrate with direction to convict of offence charged.

For the appellant:

Attorney-General, Tanganyika.

K. R. K. Tampi (State Attorney, Tanganyika)

The respondent did not appear and was not represented.

Republic v Jaine Charles Nelson Kondowe
[1964] 1 EA 185 (HCT)

Division:	High Court of Tanganyika at Dar-es-Salaam
Date of judgment:	23 January 1964
Case Number:	16/1964
Before:	Law J

[1] Criminal law – Complainant – Information given by company – Proceedings by public prosecutor against employee – Accused acquitted – Recommendation by magistrate that employer pay accused salary and compensation – Further recommendation or order for payment of compensation and costs as charge considered frivolous and vexatious – Whether proceedings a public prosecution – Validity of recommendations.

Editor's Summary

The accused was acquitted on two counts of stealing by a servant. The proceedings had been instituted by the public prosecutor on information supplied by a company, the employer of the accused. In his judgment the magistrate said that the whole case appeared to him to be a bundle of conspiracy and recommended immediate payment to the accused by his employers of his salary and compensation for unlawful dismissal or reinstatement in his part. Purporting to act under s. 175 of the Criminal Procedure Code he also recommended payment of Shs. 2,000/- for compensation and costs on the basis that the charge was frivolous and vexatious. In revision,

Held –

- (i) the peremptory recommendation or order for immediate payment of salary and compensation was invalid, void and of no effect whatsoever;
- (ii) the public prosecutor was the complainant and not the company which gave the information which led to the proceedings brought by the public prosecutor;
- (iii) the provisions of s. 175 of the Criminal Procedure Code have no application to a public prosecution and the purported recommendation or order that “the complainant company” should pay Shs. 2,000/- compensation was also invalid, void and of no effect whatsoever.

Magistrate's recommendations or orders set aside.

Cases referred to in judgment:

- (1) *R. (on the information of Karsandas Samji) v. Kassamali Jaffer and others* (1930), I.T.L.R.(R.) 176.

Judgment

Law J: The accused was tried by one of the learned resident magistrates (Mr. Echetabu) in the Dar-es-Salaam district court on two counts of stealing by servant, contrary to ss. 271 and 265 of the Penal Code.

The proceedings were instituted by the public prosecutor. The learned magistrate acquitted the accused on both counts, stating “the whole case appears to me to be a bundle of conspiracy”. It is not clear if the Criminal Investigation Department, which investigated and prosecuted the charge, is included in this accusation of conspiracy. In addition, the learned magistrate made the following two “recommendations”:

“I recommend his (the accused's) salary being paid him before noon today 15/1/64 and also the company

paying him a compensative sum for unlawful dismissal or re-instating him into his former job, with all the arrears paid, whichever he prefers.”

“Under my powers, by virtue of s. 175 C.P.C., I recommend that the sum of Shs. 2,000/- (Shillings) be paid to the accused for his being a victim

of frivolous or vexatious charge, by the complainant company . . . which employed and dismissed him.”

As regards the first “recommendation”, which is couched in the peremptory terms of an order (e.g. “before noon today”), I invited the learned magistrate to inform me under what authority he made it in criminal proceedings, but he has not done so, beyond saying that the record and judgment are clear on this point, which they are not. For the avoidance of any doubts which may exist, I declare that this recommendation or order is invalid, void and of no effect whatsoever.

As regards the second “recommendation”, it purports to be made under s. 175 of the Criminal Procedure Code, which section reads:

“If on the acquittal of an accused person any court shall be of the opinion that the charge was frivolous or vexatious, such court may order the complainant to pay to the accused person a reasonable sum as compensation for the trouble and expense to which such person may have been put by reason of such charge in addition to his costs.”

The second “recommendation” was therefore intended to be an order. The effect of this section, (then s. 168), was considered by Sheridan, C.J. in *R. (on the information of Karsadas Samji) (appellant) v. Kassamali Jaffer and others* (1). The learned Chief Justice said:

“Nor can any provisions of s. 168 of the Code have any application to a public prosecution in my opinion.”

I respectfully agree with that view. The instant case was a public prosecution, and the purported recommendation or order that “the complainant company” should pay Shs. 2,000/- compensation is invalid, void and of no effect whatsoever, and I hereby set it aside. The company, which gave the information which led to the proceedings brought by the public prosecutor, is not the “complainant” for the purposes of s. 175 aforesaid. The “complainant” was the public prosecutor.

Magistrate’s recommendations or orders set aside.

Coast Brick & Tile Works Ltd and others v Premchand Raichand Ltd and another

[1964] 1 EA 187 (CAN)

Division:	Court of Appeal at Nairobi
Date of judgment:	5 March 1964
Case Number:	37/1962
Before:	Sir Trevor Gould VP, Newbold and Crabbe JJA
Sourced by:	LawAfrica
Appeal from	The Supreme Court of Kenya – Rudd, Ag. C.J.

[1] *Money-lender – Agreement to lend on security of mortgage – Loan guaranteed by sureties – Money advanced on various dates – Part advanced on Guarantee before execution of mortgage – Balance advanced after mortgage executed – Whether all advances form one transaction secured by mortgage –*

Whether sums advanced before mortgage exempted by s. 3 of the Money-Lenders Ordinance.

[2] Mortgage – Attestation – Mortgage by company – Seal of company affixed as required by articles of association – Whether mode of attestation governed by s. 58 of the Registration of Titles Ordinance or s. 59 of the Indian Transfer of Property Act, 1882.

[3] Guarantee – Sureties joining in mortgage – Mortgage duly executed by borrower and registered – Whether signatures of sureties must be attested as required for due execution of mortgage.

Editor's Summary

The first respondent was the mortgagee of certain land of which the registered proprietor and mortgagor was the first appellant. In November, 1955, Kanji, a director of the mortgagor, approached Hemraj, a director of the mortgagee, for a loan of Shs. 1,000,000/-, and in the ensuing negotiations, Kanji offered as security "a mortgage and blank transfer of 1,500 shares" in his company "and the personal guarantees of shareholder and directors of the company and security of some good business people". By a letter dated November 29, 1955 signed by Kanji and one B. R. Shah, a defendant who was not served and did not appear in the proceedings, they confirmed on behalf of the mortgagor that in consideration of Shs. 1,000,000/- to be advanced to the mortgagor they undertook to have all the papers executed including a debenture, to deposit the title deeds free from encumbrances and joint and several guarantees of each and every shareholder both present and future. On December 1, 1955 Kanji handed to Hemraj a guarantee of that date which recorded that it was made in consideration of "certain business or credit facilities" to the mortgagor limited to £50,000; the date for repayment and rate of interest were not mentioned but it was signed by all the other appellants as sureties and also by one Harilal Kanji, who was not a party to the mortgage subsequently executed. On delivery of the guarantee Shs. 200,000/- were advanced and subsequently sums aggregating Shs. 450,000/- were advanced on six different dates before the mortgage was ready. After the mortgage was executed Shs. 300,000/- further were paid on February 6, 1956 to the credit of the mortgagor with the National Bank of India Ltd., to discharge its prior encumbrance and the balance of Shs. 50,000/- was paid on February 24, 1956. The discharge of the bank's security was registered in the Registry of Titles contemporaneous with the new mortgage. Subsequently the mortgagor defaulted in payments under the mortgage and the mortgagee brought an action claiming against the mortgagor an order for sale of the land and against the other appellants as sureties the amount of any deficiency. The judge held that the dealings between the parties all formed one money lending transaction secured by a mortgage on land and made a preliminary decree for

sale and granted the other relief sought. On appeal it was contended for the appellants that the money-lending transaction was not taken outside the scope of the Money-Lenders Ordinance by s. 3 and was unenforceable, that the judge's finding that the dealings were one transaction secured by mortgage was wrong, that the mortgage was invalid for lack of attestation of its execution by the mortgagor and defective attestation of its execution by the sureties, and that there was no consideration in the cases of some, if not all of the sureties who joined in the mortgage.

Held –

- (i) the court approached the transaction on the basis that it was bona fide money-lending, that security was given over immovable property though there was also other security, and that it was always the intention of the parties that the loan should be Shs. 1,000,000/- though the actual advance was made in instalments, some of which were before and some after the execution of the security upon the immovable property;
- (ii) the transaction fell directly within the wording and intent of s. 3(1)(b) as a normal transaction of lending money on the security of a mortgage of immovable property;
- (iii) s. 58 of the Registration of Titles Ordinance provides a code in relation to attestation of instruments required to be registered under the Ordinance; s. 1 (2) and s. 58, *ibid.* must supersede, in relation to and under the Ordinance, the requirements of s. 59 of the Indian Transfer of Property Act, 1882 that a mortgage be signed by the mortgagor and attested by at least two witnesses;
- (iv) the mortgage was properly executed by the mortgagee and no attestation was needed; accordingly a valid charge was created;
- (v) the signatures of the sureties having been proved did not require attestation under s. 58, *ibid.*; even if the sureties could claim that registration was bad as against them, that would not affect their liability on their covenant as there was nothing in the Registration of Titles Ordinance or anywhere else that such a covenant either must be registered or is invalid as a contract for want of registration;
- (vi) when the sureties signed the original guarantee of December 1, 1955, they must have known the position and their signatures on the mortgage would imply a request for payment of at least the remainder of the agreed advance, thereby providing consideration for their covenant.

Appeal dismissed.

Cases referred to in judgment:

- (1) *S. N. Shah v. C. M. Patel*, [1961] E.A. 397 (C.A.).
- (2) *Buganda Timber Co. Ltd. v. Mulji Kanji Mehta*, [1961] E.A. 477.
- (3) *Govindji Popatlal v. Nathoo Visandjee*, [1962] E.A. 372 (P.C.); [1960] E.A. 361 (C.A.).
- (4) *Bank of Victoria v. McMichael* [1882], 8 V.L.R.L. 11.

The following judgments were read:

Judgment

Sir Trevor Gould VP: The first respondent company in this appeal (hereinafter referred to as “the mortgagee”) held a mortgage over land in Kenya, the registered proprietor of which was the first of the appellants named above (hereinafter referred to as “the company”). The mortgagee brought an action in the Supreme Court of Kenya against the company as mortgagor of

the said land joining therein as defendants the second to seventh appellants (inclusive) who, together with one other, were described in the mortgage as sureties. The other was also described as a surety, and was made the sixth defendant in the action, but, as he was not served, the action did not proceed against him and he is not an appellant. There was a second mortgage over the land in favour of the second respondent company, which was joined in the action as the ninth defendant. The mortgagee's claim, in consequence of default in payment of moneys due under the mortgage, was for the usual preliminary decree for sale of the land and in the event of deficiency, for liberty to apply for a personal decree against the company and the sureties jointly and severally for the amount thereof. In the Supreme Court the mortgagee succeeded and the learned Acting Chief Justice made the preliminary decree as claimed, together with liberty to apply for personal decrees against all but the sixth defendant. Against that judgment and decree the appellants now bring this appeal.

There are certain matters which are common ground. One is that, among other businesses, the mortgagee at the relevant time carried on the business of money-lending. Another is that in respect of the transaction for which the mortgage is relied upon as security, the requirements of s. 11 of the Money-Lenders Ordinance (Cap. 528, Laws of Kenya) were not complied with. As a result, unless the provisions of that Ordinance do not apply to the transaction by virtue of the operation of s. 3(1)(b) thereof, the action by the mortgagee must fail. Finally, on the fourth day of the hearing of the appeal in this court, it was conceded by counsel for the appellants that the transaction in question fell to be considered on the basis of registration of the mortgagee under the Registration of Titles Ordinance (Cap. 281, Laws of Kenya) and not the Land Titles Ordinance (Cap. 282), that, then, became common ground for the first time.

The substance of the attack by counsel for the appellants upon the validity and enforceability of the mortgage (as modified by the concession above referred to) can, I think, be considered under three very general heads. It is claimed:

- “(a) that the moneylending transaction was not taken out of the scope of the Money-Lenders Ordinance by s. 3 and is therefore unenforceable. This is concomitant with an attack upon the finding of the Acting Chief Justice that the dealings between the parties concerned all formed one complete money-lending transaction secured by a mortgage or charge on immovable property and involves reference to previous decisions of this court, and to legislation touching land and chattels;
- “(b) that the mortgage was invalid for lack of attestation of its execution by the company and defective attestation of its execution by the sureties. This involves consideration of the question whether, if attestation was necessary under the law and was in fact lacking or defective, the mortgage was nevertheless valid by reason of the provisions of the Registration of Titles Ordinance pointing to what has been called ‘the sanctity of the register’;
- “(c) that there was no consideration in the cases of some, if not all, of the sureties who joined in the mortgage.”

It will now be convenient to deal with the history of the events preceding and surrounding the execution of the mortgage which was dated January 31, 1956, and registered by the Registrar of Titles on February 27, 1956. A memorial of its registration appears on the Certificate of Ownership of the land which shows the company as owner by transfer, and which now falls to be considered as a certificate of title under the Registration of Titles Ordinance.

The main evidence of the sequence of events came from Hemraj Nathubhai Shah (hereinafter referred to as “Hemraj”), a director of the mortgagee, and it is not without significance that the company failed to call any witness on this aspect of the matter, confining its evidence to questions of attestation and consideration. In November, 1955, Kanji Meghji Shah (hereinafter referred to as “Kanji”), a director and manager of the company, approached Hemraj for a loan of Shs. 1,000,000/- for the company, which was badly in need of money. Hemraj was taken by Kanji to see the company’s factory which was on the land subsequently mortgaged, and considered the land and factory to be worth, at that time, about Shs. 3,000,000/-. Kanji agreed to give as security “a mortgage and blank transfer of 1,500 shares in the company and personal guarantees of shareholder and directors of the brick factory and security of some good business people.”

The arrangement was confirmed by a letter signed by Kanji and one B. R. Shah, the sixth defendant, dated November 29, 1955, which is in the following terms:

“At my request, you have considered to advance to Coast Brick & Tile Works Ltd., of Mombasa, a sum not exceeding Shs. 1,000,000/- (Shillings One Million only), and in consideration of this I hereby undertake to get executed in the proper manner by the company all the papers, such as a debenture on the assets of the above company, deposition of the title deeds free from all incumbrances of the properties belonging to the said company, joint and several guarantees of each and every share-holder both present and future of the said company and the deposition of the share-certificates of all the share-holders together with the blank transfers thereof together with a resolution passed in the directors meeting that they will not object the transfer of the shares when it is required to do so and such other papers which are necessary to secure the above loan.

“I hereby authorise you to instruct your advocates to prepare all the necessary documents required by you to give effect to the above and any further papers or documents not enumerated in the above which are necessary and hereby confirm all the legal costs and incidental expenses will be borne by the said borrowing company.”

Clearly the loan contemplated from the outset was one of Shs. 1,000,000/-. The letter speaks of “deposition” of the title deeds free of encumbrances; there was already a registered charge by deposit of title deeds on the property in favour of the National Bank of India Ltd., and according to Hemraj’s evidence it was agreed that this was to be released. On or about December 1, 1955, Kanji handed to Hemraj a guarantee bearing that date on a form used by the mortgagee. It is made in consideration of “certain business or credit facilities” being allowed to the company, and is limited to “£50,000/- East African” which rather contradictory expression, I take it to be common ground, is intended to mean £50,000, or Shs. 1,000,000/-: the date for repayment and rate of interest are not mentioned. The guarantee was signed by all the sureties joined in the action and also by one Harilal Kanji, who was not joined as a party to the mortgage subsequently executed.

When the guarantee of December 1, 1955, was handed over, an advance of Shs. 200,000/- was made: then there were further advances of Shs. 200,000/- on December 5, Shs. 50,000/- on the 9th and Shs. 50,000/- on December 23, Shs. 50,000/- on January 11, 1956, and Shs. 100,000/- on January 16, 1956. Then, after the mortgage was signed, Shs. 300,000/- was paid on February 6 to the credit of the company with the National Bank of India Ltd. to discharge its prior encumbrance and the balance of Shs. 50,000/- was paid on February 24, 1956. At some date not specified, Hemraj was handed a blank share transfer form bearing the signature of Kanji and that of a witness, but unaccompanied

by any share certificates. The discharge of the security of the National Bank of India was duly registered against the title on the same day as the new mortgage. In his evidence Henraj said that he gave instructions to Messrs. Cumming & Miller, Advocates, to have the mortgage drawn. As I have said, his evidence was not contradicted by any witness for the appellants, and receives confirmation from a letter in evidence, which I need not set out, indicating that before December 10, 1955, Messrs. Cumming & Miller had asked the National Bank of India for the title deeds, undertaking to hold them in trust for the bank. The only reasonable inference is that they wanted the deeds to enable them to prepare an appropriate security.

On these facts and this evidence I have no doubt whatever that there was ample justification for the finding of the Acting Chief Justice that the events in question all formed one transaction flowing from the original agreement to lend a million shillings in all. By this I understand him to mean that the mortgage over the land and factory was always intended to be included in the security and the loan from the first was to be Shs. 1,000,000/-.

Counsel for the appellants submitted that there was no evidence of a binding agreement to that effect and only vague evidence of an oral agreement. It appears to me immaterial whether the agreement was binding; the question is what was the transaction which the parties arranged or agreed to carry out. As I have indicated, I consider the evidence as to that to be clear and uncontroverted. An advance of a million shillings does not necessarily have to be made in one lump sum. Counsel for the appellants relied upon passages in Hemraj's evidence to the effect that he was prepared to lend on the guarantee of December 1, 1955, as indicating that the mortgage might have been an afterthought. I do not accept that the passages, read in the context of the whole of Hemraj's evidence, bear any such import, and no witness for the appellants was called to support the suggestion. Again, counsel relied upon the fact that Harilal Kanji, who signed the guarantee, did not become a party to the mortgage. Harilal Kanji was not called as a witness and the reason for the change is unknown, but the argument is in my view quite insufficient to negative or weaken the evidence that the whole of the moneys advanced were in fact secured by the mortgage and were always intended so to be. The principal parties were the company and the mortgagee, as borrower and lender, I am unable to see that it is of any materiality that one surety was permitted to drop out, nor do I consider to be relevant to present issues the question whether any liability existed or survived in Harilal Kanji. A further argument advanced for the appellants was that the mortgage, in which the phrase, "... in consideration of the sum of Shillings One Million now paid to the company by the chargee" was used was inaccurate and misleading in that the moneys were not "now paid" but advanced by instalments. I am unable to see that this argument assists the appellants. If the transaction evidenced by the mortgage is within the Money-Lenders Ordinance it is unenforceable for other reasons. If it is not within the prohibitions of that Ordinance there is no legal requirement that the consideration for a mortgage of land must be expressed with complete particularity, and in my view the method adopted in the mortgage, as between the parties to it, was adequate to cover the actual method of advance. I think I might mention at this stage that this difference between the mode of expressing the consideration in the mortgage and the actual method of advance was made the subject of a submission by counsel for the appellants in relation to s. 3 of the Money-Lenders Ordinance (set out below). The argument was that in order to qualify for exemption under that section a money-lending transaction must be bona fide. I do not quarrel with this, though the expression is not used in the opening words of s. 3(1)(b). The argument then proceeded that because under s. 11, as construed by court decisions, great accuracy was required in setting out in the memorandum the details of the

contract and the date of the advance, a money-lending transaction would not qualify for exemption under s. 3 unless the same particularity was observed in setting out the consideration in the mortgage deed which secures the loan. With respect, I think this is a non sequitur: s. 3 deals with what is without and not within the Ordinance and in my opinion a money-lending transaction upon the security of immovable property is bona fide if it is genuine, as opposed to sham or colourable, and is made in compliance with the law applicable to such mortgages generally.

In approaching the questions arising under the Money-Lenders Ordinance, therefore, I do so on the basis that the transaction under consideration was a bona fide transaction of money-lending; that security was given over immovable property though there was also other security; and that and it was always the intention of the parties that the loan should be Shs. 1,000,000/- though the actual advance was made in instalments, some of which were before and some after the execution of the security upon the immovable property.

Section 3 of the Money-Lenders Ordinance reads as follows:

“3.(1) The provisions of this Ordinance shall not apply –

- (a) to any money-lending transaction where the security for repayment of the loan or of interest thereon is effected by execution of a chattels transfer in which the interest provided for is not in excess of nine per centum per annum;
 - (b) to any money-lending transaction where the security for repayment of the loan or of interest thereon is effected by execution of a legal or equitable mortgage upon immovable property or of a charge upon immovable property or of any bona fide transaction of money-lending upon such mortgage or charge.
- (2) The exemption provided for in this section shall apply whether the transactions referred to are effected by a money-lender or not.”

Counsel for the appellants called attention to the scope of the money-lending legislation at the various stages since its inception in Kenya by the Money-Lenders Ordinance, 1932 (No. 45 of 1932). In that Ordinance the scope was defined in relation to occupation, “money-lender”, including all persons whose business was money-lending, but excluding those whose business was pawn-broking, banking, insurance or “lending money on mortgage”; and any business not having the primary object of lending money. That Ordinance came into operation on January 1, 1933, but by Ordinance No. 44 of 1933 the excluded business of “lending money on mortgage” was replaced by that of lending money on “chattels transfer, or on mortgage or charge of immovable property”. Thus the exclusion of those who lent money on securities was limited to some extent but the definition still related to the business and not the transaction.

A major change was brought about three years later. By Ordinance No. 37 of 1936, all the excluded businesses, except that of pawnbroker, were deleted from the definition of “money-lender” and a new section, identical for all material purposes with the present s. 3 was enacted, placing emphasis for the first time on the transaction instead of the business. In 1959, by Ordinance No. 36 of that year, the legislature again enacted that a number of persons carrying on certain types of business should be excluded from the definition of “money-lender” and the definition so enacted was deemed to have come into operation on January 1, 1933. The businesses exempted were those carried on by pawn-brokers, building societies, banking companies, insurance, or those of persons whose primary object was not money-lending. This amendment made the definition of money-lender substantially the same as that in equivalent English legislation, but the present s. 3, which has no counterpart in English legislation,

was not repealed, with the result that in Kenya exemption may be available under the definition by reference to the nature of the business, or, under s. 3, by reference to the nature of the transaction.

I am afraid I do not derive any assistance from consideration of the history of the legislation in the problems of construction of s. 3 in relation to the facts of this case. Counsel for the appellants suggests that the reason for the exemptions contained in the section is that such transactions are sufficiently protected from the point of view of public interest by the requirements of the Chattels Transfer Ordinance (Cap. 28, Laws of Kenya) and the Registration of Titles Ordinance, and as I understand him, seeks to intensify on this account the requirements as to form contained in the latter, a process of induction. Counsel for the mortgagee suggests that the policy was to render transactions registered under land systems in which there was some form of guarantee of title, immune from being “wrecked” by the type of mis-statement, accidental or otherwise, which would fall within s. 11 of the Money-Lenders Ordinance. Neither suggestion appears to take full account of the wide range of mortgage transactions which may be effected under the Land Titles Ordinance and the Crown Lands Ordinance, in which there are no requirements as to the form of mortgages and little or no guarantee of title. As to chattels, moreover, s. 11 of the Money-Lenders Ordinance applies with full effect, despite registration and the strict terms of the Chattels Transfer Ordinance, provided the interest exceeds 9 per cent, per annum.

I agree with counsel for the mortgagee that there is nothing in the history of the legislation which ought to be treated as showing that s. 3 means anything but what it says. In it I find a clear statement of intention that money-lending transactions upon the security of mortgages of immovable property are taken out of the Ordinance with the result that they must be looked at as if the Ordinance did not exist. In the case of *Shah v. Patel* (1), this court held that the exemption provided by the section was not affected by the fact that there might be other security for the loan in addition to the immovable property. That finding is binding on this court and it follows that it is not material in the present case that a blank share-transfer form was handed to the mortgagee or that there were guarantors. That point being eliminated and the transaction being bona fide what remains? As I see it there is only the fact that a number of instalments of the advance were paid over prior to the execution of the mortgage.

Counsel for the appellants submitted that prior to such execution the amounts advanced after the signing of the guarantee of December 1, 1955, would have been irrecoverable, that the contract to repay them would have been unenforceable by virtue of s. 11 of the Money-Lenders Ordinance. That would, of course, be the position if there never had been any question of a mortgage but that was not the case. I do not have to consider whether, if some supervening occurrence had resulted in the mortgage not being executed, the oral agreement that there should be one would have been sufficient to invoke s. 3(1)(b), for that did not happen, the decision of this court in *Buganda Timber Co. Ltd. v. Mulju Kanji Mehta* (2), makes it probable that such an agreement would be held insufficient. These considerations are not relevant to the present facts in which the mortgage of immovable property was a part of the bargain from the beginning, and no more than normal delay took place before the mortgage was executed. Accepting that the other securities were irrelevant I do not think it can be doubted that the transaction fell directly within the wording and intent of s. 3(1)(b) as a normal transaction of lending money on the security of a mortgage upon immovable property.

An argument that the word “is” in s. 3(1)(b) made it necessary that the loan be contemporaneous with the execution of the security was rejected in *Shah v. Patel* (1). Even had it not been it would not have availed the appellants here, for counsel in *Shah’s* case could only put this argument as high as “at or about

the time the loan was made” which is a reasonably apt description of what occurred here. In that case the learned President said, (1) ([1961] E.A. at pp. 403-404):

“If the time for payment is extended in reliance on the security of an existing charge, there is, in my opinion, a ‘transaction of money-lending upon such . . . charge’. The learned judge found that the material transactions in this case were made bona fide, and I see no reason to differ from that finding. Even if the previous loan would have been unenforceable because of some provision of the Money-Lenders’ Ordinance, I see nothing to prevent the borrower agreeing, if he wished, to renew the contract in consideration of a promise of further advances and to secure it by a charge on land which would oust the provisions of that Ordinance. The presence in the Ordinance of s. 3(1)(b) would distinguish such a case from *Dunn Trust v. Feetham*, [1936] 1 K.B. 22.”

Counsel for the appellants has rightly pointed out that *Shah’s* case (1) related to a subsequent advance upon an existing security and not to a security given subsequently to the advance, that is that the contest related to the concluding words of s. 3(1)(b) and not the earlier part. I think the opinion expressed in the passage quoted would nevertheless embrace the provision of immovable security upon the renewal of an existing loan; that does not arise here, nor does any question of the position which would arise if immovable security, not part of the original bargain, were provided during the currency of a loan not yet due for payment. For the purpose of the present case all I would gather from the passage quoted is that in the meaning of the word “is” in s. 3(1)(b) there is no emphasis on time so as to require that security and loan be rigidly contemporaneous. On the view of the transaction formed by the learned judge, which I have endorsed above, loan and security are so wedded in time and in the contemplation of the parties as to bring the transaction naturally and inevitably within the terms of s. 3(1)(b). The grounds of appeal relating to this aspect of the case, in my opinion, fail.

I pass now to the questions relating to the attestation of the signatures to the mortgage. The Acting Chief Justice found that the common seal of the company was affixed to the document in the presence of three defendants and in accordance with the Articles. That is now common ground and it is not claimed by counsel for the mortgagee that the three defendants signed otherwise than as part of the execution, i.e., they were not attesting witnesses. The signatures of the sureties (dividing into two groups) all purport to have been witnessed by two persons, there were controversial matters touching the attestation of these signatures which counsel for the appellants submits were left unresolved by the Acting Chief Justice, but which counsel for the mortgagee claimed were resolved at least by implication.

I will take first the case of the company, the registered proprietor of the land and the borrower of the money. Section 46 (1) of the Registration of Titles Ordinance provides that whenever any land is intended to be charged or made security “the proprietor . . . shall execute a charge . . . which must be registered . . .”. Part XII of the Ordinance contains one section only and is headed “Attestation of Instruments”. Omitting sub-ss. (1)(b) and (1)(c) which enumerate persons who may attest instruments executed outside Kenya, s. 58 reads as follows:

“58(1) Every signature to an instrument requiring to be registered and to a power of attorney whereof a duplicate or an attested copy is required

to be deposited with the registrar shall be attested by one of the following persons –

- (a) within Kenya –
 - (i) a judge or magistrate;
 - (ii) a registrar of titles;
 - (iii) a notary public;
 - (iv) an advocate;
 - (v) a justice of the peace;
 - (vi) the Registrar or Deputy Registrar of the Supreme Court;
 - (vii) an administrative officer;
- (2) In all cases where an official holding a seal of office shall attest any instrument he shall authenticate his signature by his official seal.
- (3) The provisions of this section shall not apply to any instrument executed by the Governor, nor to any instrument executed under its common seal by a company within the meaning of the Companies Ordinance, nor to any instrument duly executed by a company to which Part X of that Ordinance applies.
- (4) An instrument executed by a company within the meaning of the Companies Ordinance shall be executed by means of the company's common seal affixed in accordance with the memorandum and articles of association."

Subsection (4) was enacted after the registration of the mortgage and has no direct bearing on the issue. Section 1 (2) of the same Ordinance reads:

- "1.(2) Except so far as is expressly enacted to the contrary, no Ordinance in so far as it is inconsistent with this Ordinance shall apply or be deemed to apply to land, whether freehold or leasehold, which is under the operation of this Ordinance."

I think it is abundantly clear that s. 58 provides a code in relation to attestation of instruments requiring to be registered under the Ordinance. The *Privy Council in Govindji Popatlal v. Nathoo Visandjee* (3) upheld the decision of this court that s. 68 of the Indian Evidence Act, 1872 (requiring proof of a registered document by the evidence of an attesting witness) was over-ridden by the provisions of the Registration of Titles Ordinance. Similarly, the sections of the Ordinance which I have referred to must supersede, in relation to land under the Ordinance, the requirements of s. 59 of the Indian Transfer of Property Act that a mortgage be signed by the mortgagor and attested by at least two witnesses. The Registration of titles Ordinance requires that a charge be executed by the registered proprietor and that every signature be attested by one person falling within certain categories.

Subsection (3) of s. 58 states that the provisions of the section shall not apply to any instrument executed under its common seal by a company. Counsel for the appellants submitted that by reason of this exemption s. 59 of the Transfer of Property Act filled the gap and applied to companies and that two attesting witnesses were required. I do not accept this. As I have stated, I believe s. 58 to contain a complete code in relation to attestation. It is inappropriate to speak of a company "signing" a document and it is to be noted that the word used in the Registration of Titles Ordinance in relation to transfers, leases and charges is "execute". The intention to my mind is quite clear; an instrument executed by a company under its common seal is valid without the attestation required by s. 58 (1). There is a passage in Hogg's Registration of Title to Land Throughout the Empire, at p. 226, which is of interest:

"In Saskatchewan, Alberta, and North-West Territories instruments under the seal of a corporation are

expressly excepted from the ordinary requirement

as to attestation; but in Saskatchewan (as in New Zealand) indemnity cannot be recovered for loss through improper use of the seal. In all these jurisdictions – South Australia to Saskatchewan – where no special mode of execution is required by the registration of statutes, the seal must of course be affixed in accordance with the corporation's own regulations, and as to this the registrar would be entitled to information; if not duly affixed, registration could apparently be refused."

In Kenya the company is expressly excepted and it is implied that the seal shall be affixed in accordance with the company's regulations, as was done, it is common ground, in the present case. Whether the new sub-s. (4) of s. 58 is designed to make explicit what was originally implied, or to exclude execution on behalf of a company by an attorney or agent, I do not need to decide. I agree, therefore, with the Acting Chief Justice that the mortgage was properly executed by the company and no attestation was needed; accordingly a valid charge was created.

I turn to the question of the sureties and the finding of the Acting Chief Justice that:

"these signatures in a personal capacity do not require attestation as a matter of law. They must have been proved and I think that is sufficient to bind them."

It is necessary to look more closely at the details of the mortgage document. It contains a recital of the mortgagee's agreement to lend the company Shs. 1,000,000/- a recital that the sureties had agreed to join in as sureties for the company, a joint and several agreement by the company and the sureties to repay, a charge of the land by the company, and an agreement that although as between the company and the sureties the latter are only sureties yet as between the mortgagee and the sureties the latter are considered principal debtors so as not to be released by the giving of time or variation of the agreement.

The words used in s. 58 (1) of the Registration of Titles Ordinance, set out above indicate that every signature to an instrument "requiring to be registered" must be attested by a person of one of the classes mentioned. The mortgage was an instrument which required to be registered because only "when registered" does it have the effect of a legal mortgage (s. 46 (2)) and because it is ineffectual to render the land liable as security until registered (s. 32). There is however, nothing in the Ordinance which requires a personal covenant to repay money or a guarantee of payment to be registered. The Ordinance concerns itself with land and the contract entered into by the sureties in the present case does not touch the land, in which they had no rights. It is only the security over the land which requires to be registered and I think the Registrar of Titles would be justified in not insisting upon attestation of the sureties' signatures in terms of s. 58. A hint of this conception of severability is to be gathered from the following passage from the textbook by Hogg above referred to, at p. 214:

"Covenants to pay life insurance premiums, and covenants for payment of principle or interest by guarantors who are not the owners of the mortgaged property may be inserted without rendering the mortgage unregistrable."

The cases mentioned are not available here but the footnote indicates that in one of them the guarantee was contained in a separate deed, which I would presume was unregistered.

I think that the signatures of the sureties did not require attestation under s. 58 of the Ordinance: if that is not so, if the proper meaning of the section is that all signatures to any instrument which, as a document, requires to be registered for any reason, must be attested, what is the result? It would mean that a matter wholly immaterial to the object of the Registration of Titles

Ordinance and affecting in no way whatever the basic validity of the charge by the registered proprietor over the land, would then preclude the registration of an instrument validly executed so far as the charge is concerned, or, if the instrument did get on the register, would then destroy the validity of the registration. I am unable to accept that as the position in law but consider that any deficiency in attestation of the sureties' signatures could not affect the validity of the registration on the charge on the land, the company's execution being valid. Even if the sureties could claim that registration was bad as against them, that would not affect their liability on their covenant as there is nothing in the Registration of Titles Ordinance or anywhere else that says either that such a covenant must be registered or its invalid as a contract for want of registration. That applies to the covenant by the company also. Section 59 of the Transfer of Property Act provides something of a parallel, for a deed invalidly attested in relation to that section may be used as evidence of the personal covenant though not of the mortgage or charge; see the authorities quoted in footnote (p) p. 373 of Mulla's Transfer of Property Act (4th Edn.). For these reasons, the signatures of the sureties having been proved, the sureties cannot in my opinion evade liability on grounds relating to the attestation.

In case I am wrong in this and the sureties ought not to be held liable on the basis indicated, I think that there is merit in the argument put forward by counsel for the mortgagee as to the result of the Acting Chief Justice's findings of fact. On the mortgage the signatures of the first four sureties purport to be witnessed by Mr. I. S. Patel, Advocate and Commissioner for Oaths, and by Mohanlal Meghji Shah, Merchant, a brother of Kanji. Mr. Patel gave evidence for the mortgagee and Mr. M. M. Shah for the appellants; they were in conflict. Shardaben (third defendant and wife of the fifth defendant) gave evidence supporting M. M. Shah. She knew nothing about the transaction and the second, fourth and fifth defendants gave no evidence. In his judgment the Acting Chief Justice said:

"The advocate, Mr. Patel, who attested their signatures cannot remember but he was adamant that these defendants were present when he purported to attest their signatures. He is not sure whether they actually wrote their signatures in his presence or whether they merely acknowledged their signatures in his presence. The defence witness says he signed in the absence of Mr. Patel but I was not inclined to believe him. As regards the fifth defendant examination of the document will show that Mr. Patel must have affixed his stamp as Commissioner for Oaths before the defence witness signed. This is consistent with the evidence, but it seems to me unlikely if this witness's evidence is true, that the defendant Ratilal who, he says, was present when the second, third, and fourth defendants signed, should not also have signed at that time. I think it is probable that these four defendants with the defence witness all attested and signed before Mr. Patel. The matter is however uncertain. In my opinion these signatures in a personal capacity do not require attestation as a matter of law. They have been proved and I think that that is sufficient to bind them."

The "defence witness" referred to there is Mr. M. M. Shah mentioned above.

The signatures of the three other sureties were purportedly witnessed by another advocate, Mr. J. J. Patel and by Mr. J. R. Pavagadhi, described on the document as "clerk". Mr. Pavagadhi gave evidence for the mortgagee and said (inter alia) that Mr. J. J. Patel also signed as an attesting witness in his presence. His evidence was contradicted (as to Mr. J. J. Patel's presence and participation) by two of the sureties concerned. The Acting Chief Justice said:

"As regards the sixth, seventh and eighth defendants there is similar conflict as to whether they signed in the presence of both Mr. J. J. Patel and the

attesting witness. I believe the attesting witness, but here again once their signatures have been proved I think attestation was not necessary as a matter of law.”

The “attesting witness” mentioned there is quite plainly Mr. Pavagadhi, who gave in evidence that Mr. J. J. Patel did attest the relevant signatures on the mortgage.

As the Acting Chief Justice, on the view he took of the law, found it unnecessary to rely on the opinions he expressed in the passages quoted, it might be thought that he may not have applied his mind to the factual problem as strongly as he would have done had his whole decision depended on it. Nevertheless he has expressed his opinion, in one case as a matter of probability and in the other, as a matter of belief, that all the signatures were witnessed by an advocate, which would fulfil the requirements of the Registration of Titles Ordinance. His opinion was expressed merely as a matter of assessment of the evidence and without regard to onus, and while it might in some circumstances be unsafe to rely on findings which a learned judge considered non-essential I am satisfied that in the present case the onus lay heavily upon the appellants, and that, holding the opinions he so expressed, the Acting Chief Justice could not possibly have held that the onus to have been discharged.

My view that there was a heavy onus on the appellants arises from two considerations. The first is the terms of the registration of Titles Ordinance. By s. 31 the Registrar must endorse on every registered instrument a certificate of the time it was presented for registration and sign and seal the certificate which then becomes conclusive evidence that the instrument was “duly registered”. That was done in the instant case. By s. 32 upon registration the land specified becomes liable as security. In view of these provisions I think that anyone who challenges the validity of a duly registered instrument (if he can do so at all) must discharge a substantial onus. The second reason for my opinion that the onus is a heavy one is based upon the particular facts of this case. The mortgage was duly registered on February 27, 1956, and the plaint in the action is dated September 21, 1960; no hint of any alleged invalidity was given during those four and a half years. There was no hint of any such allegation in the defence in the action and no claim or application that the register should be rectified. Only after the mortgagee’s case was closed was the argument for the appellants developed on an allegation of invalidity for want of proper attestation. As the learned judge remarked at one stage, everyone was taken by surprise except the advocates for the appellants. However, with some doubt, he allowed the argument, on the basis that the matter could have been put right by amendment. It seems to me a matter for regret that that course was not insisted upon. At the close of the appellant’s case counsel for the mortgagee applied to call Mr. J. J. Patel, the second advocate-witness; it was an application which, in the circumstances, should have met with no objection, but it was objected to and, unfortunately, the application was not pressed. A case so presented cannot inspire confidence and, I consider, added to the weight of the onus already on the appellants, Having regard to what I have said on this matter of onus I would have not hesitation in accepting the opinions of the Acting Chief Justice on the facts, expressed as they were, as a sufficient indication that he did not find that onus discharged. This provides an additional reason for holding that the appeal, on this aspect of the case, cannot succeed.

There is another matter to which I will make brief reference. I have already mentioned that in the case of *Govindji Popatlal v. Nathoo Visandjee* (3) the Privy Council endorsed the view of this court that the provisions of the Registration of Titles Ordinance rendered compliance with s. 68 of the Indian Evidence Act unnecessary. That decision related to the mode of proof and is not therefore

precisely in point here, but a passage from the Privy Council's judgment has been relied upon for the mortgage. When the case was decided in this court Windham, J.A. (with whom the other two members of the court agreed) having set out ss. 1 (2), 23 and 32 of the Registration of Titles Ordinance, said ([1960] E.A. at p. 365):

"The effect of these two sections of the Registration of Titles Ordinance, as I see it, is that, subject to the provisions regarding the rectifications or setting aside of registration contained in Parts XIII and XIV of the Ordinance, and to the exception of fraud or misrepresentation as set out in s. 23 itself, the registration under the Ordinance of a mortgage or charge on land, if duly proved, shall be accepted by the courts as conclusive of the validity of the document effecting it, including that which is a pre-requisite of its validity, namely its due execution; and such proof of execution dispenses, to my mind, with the conflicting and more general requirements regarding proof of the execution of certain documents laid down by s. 68 of the Indian Evidence Act. While registration does not afford irrebuttable proof of due execution, it raises a presumption which can only be rebutted if lack of due execution is specifically pleaded and proved within the framework of the Ordinance. Any other conclusion would violate the general principle of the sanctity of the register, which is the foundation of all legislation based, as the Registration of Titles Ordinance is, upon the Torrens system of registration."

In the judgment of the Privy Council ([1960] E.A. at pp. 375-6 of the report) is the following passage:

"In the present case the original of the charge and a certificate of title endorsed with a memorial of the charge were produced in evidence by the respondent. The certificate of title was in terms of s. 23 conclusive evidence of the title of the mortgagee to the property. The charge when registered under s. 32 has by s. 46 the effect of a legal mortgage which transfers the property to the mortgagee leaving only an equity of redemption to the mortgagor. Upon the production of the charge and the certificate of title with the memorial of the charge endorsed thereon it became unnecessary for the respondent to comply with the terms of s. 68 of the Evidence Act. In the view of their lordships s. 23 and s. 32 of the Registration of Titles Ordinance superseded s. 68 of the evidence Act in regard to any requirement as to proof of the charge. Their lordships are able to adopt without qualification this observation of Windham, J.A., in the Court of Appeal.

'Any other conclusion would violate the general principle of the sanctity of the register, which is the foundation of all legislation based, as the Registration of Titles Ordinance is, upon the Torrens system of registration'."

It will be seen that the reference to a rebuttable presumption in the judgment of Windham, J.A. (while not dissented from) was not repeated by the Privy Council. The facts of the case in relation to parties were that the respondent was the original mortgagee and the appellant one of three original mortgagors who had in the meantime acquired the shares of both the others so as to become sole registered proprietor. In the present case counsel for the appellants sought to distinguish the case on the ground that the principle of the sanctity of the register does not apply to any issue between the parties to the registered instrument, while counsel for the mortgagee relied upon the decision as conclusively disposing of the attestation point in his favour.

The matter is not essential to my judgment in this appeal and I prefer to leave it open. Generally speaking, in relation to systems of registration of title, I would say that as between the original parties to an instrument and before any question of the rights of others arises, it is open to the courts to put right all questions of substance, either by rectification of the register or under its powers to order instruments to be executed, to make vesting orders and the like. Whether attestation is such a question may depend on circumstances but that it may be, receives some support from a sentence in the well-known, but unfortunately not recent, textbook, Hogg's Australian Torrens System at p. 915:

"A deed does not, under ordinary circumstances, require attestation as a condition of its validity. The express provisions of the Torrens Statutes appear to make attestation by at least one witness essential to the validity of a statutory instrument; and, as between the parties, invalidity for want of attestation would not be cured by registration."

The authority for the last part of that statement (*Bank of Victoria v. McMichael* (4)), is not available here and no comparison can be made of the relevant legislation. I am content in the present case to rely upon the provisions of the Registration of Titles Ordinance in the matter of onus only, the rebuttable presumption mentioned by Windham, J. A.

The last question is that of consideration in relation to the sureties. Counsel for the appellants submitted that there was no evidence of a request by the sureties in relation to the advance on the mortgage, and that much of the money had been advanced before they signed the mortgage. Counsel for the mortgagee contends that the mortgage on the face of it contains mutual covenants by the company and sureties on the one hand and the mortgagee on the other. For the mortgagee's covenant he relied upon para. 1 of the express agreements between the parties, to the effect that if the interest was punctually paid and the covenants observed other than that for payment of the principle sum by instalments, the mortgagee would not call in the principal sum or any part thereof before a specified date. The mortgagee did not execute the mortgage but could not very well rely upon it without submitting to be bound by all of its terms. Counsel for the appellants did not in his reply answer this submission and it appears to be a valid one in law. Apart from that, the sureties, all of whom signed the original guarantee of December 1, 1955, must have known the position and their signatures on the mortgage would imply a request for payment of at least the remainder of the agreed advance, providing consideration for their covenant. I think this ground of appeal also fails.

For the reasons I have given, I would dismiss the appeal and order the appellants to pay the costs of the mortgagee, certified for two counsel.

I would not disturb the orders made for costs in the Supreme Court. Counsel for the appellants has complained of having been ordered to pay the costs there of the second mortgagee (the second respondent to this appeal). It is not disputed that he was properly joined in the action and his mortgage was only admitted on behalf of the appellants to be valid at a late stage in the action. His costs were in the discretion of the Acting Chief Justice and I am not satisfied that any case has been made out for interference with his order. The position in this court in relation to the second respondent is different. He was served with the proceedings as a party affected and appeared by counsel throughout. This was unnecessary, as study of the grounds of appeal should have made it clear that there was no attack upon his security; the attack upon his order for costs did not necessitate his attendance for four and a half days. I would order that the appellants pay the second respondent's costs of the appeal with a

direction that his instructions fee be limited to Shs. 500/- and his fee for attendance at the appeal be limited to that for one day.

Newbold JA: I agree.

Crabbe JA: I also agree, and have nothing to add to the reasons given by Gould, V.-P., with which I entirely concur.

Appeal dismissed.

For the appellants:

Velji Devshi & Bakrania, Nairobi

Muir Hunter (of the English bar), *D. N. Khanna* and *Velji Devshi*

For the first respondent:

J. J. & V. M. Patel, Nairobi

R. J. Parker, Q.C., (of the English bar), *J. M. Nazareth, Q.C.* and *J. J. Patel*

For the second respondent

Doshi & Doshi; Mombasa

V. K. Doshi

Mussa Hassan v Hunt and another [1964] 1 EA 201 (CAD)

Division:	Court of Appeal at Dar-es-Salaam
Date of judgment:	8 February 1964
Case Number:	24/1963
Before:	Sir Ronald Sinclair P, Sir Trevor Gould VP and Crawshaw JA
Sourced by:	LawAfrica
Appeal from:	The High Court of Tanganyika – Biron, J.

[1] *Contract – Repudiation – Sales of Goods – Contract to supply pure milk – Contract for a year – Contract between producer and retailer – Some milk sour after delivery to retailer – Milk good at time of delivery – Producer of milk not notified that some milk turned sour – Whether retailer entitled to repudiate contract.*

[2] *Pleading – Special damage – Claim for liquidated damages – Liquidated damages specified in agreement between parties – Liquidated damages held to be penal – No plea for special damages – Whether court can award compensation on original claim when no claim for special damage pleaded.*

Editor's Summary

The appellant agreed to purchase from the respondents all the milk produced by them for a year subject to termination in the event of certain specified breaches of the agreement. By cl. 6 of the agreement the respondents as vendors undertook to supply pure unadulterated milk and the appellant as purchaser had the right to reject any milk which was not of the right quality. The appellant was to examine the milk on delivery at the respondents' farm. Clause 7 provided, inter alia, that the respondents remained responsible for the quality of the milk until it was tested by the appellant at his premises in Arusha within four hours after delivery, and by cl. 10 in the event of default liquidated damages of £100 for every thirty days should be payable for the unexpired term of the contract. The appellant collected the milk daily from January 11 until January 18, inclusive, after which date he collected no more. On January 17 he wrote a letter to the respondents, which they received next day complaining that the milk received by him that day had "not been passed through a refrigerator cooler", but did not suggest that it was not of marketable quality. On January 19 the appellant having failed to collect the milk, the respondents took it to him at his shop in Arusha, but he refused to accept it, whereupon they had it tested by a Public Health Inspector who certified that it was fit for human consumption. That day the respondents also received a letter from the appellant written the day before stating that since he had received complaints from his customers from January 15 onwards that the milk was going bad, he would have to terminate the agreement as from January 19, 1962. The respondents

denied any breach of contract and held the appellant liable under terms thereof, and later brought an action in the High Court claiming, inter alia, a sum of Shs. 22,000/- as liquidated damages for the unexpired period of the agreement. The judge, while coming to the conclusion that some of the milk supplied had gone bad, made no finding as to the quantity of milk which had gone bad or upon how many days, and held that the appellant was not entitled to terminate the contract. He accordingly awarded Shs. 3,394/30 as damages for the period January 19 to the end of March when the respondents did not sell their milk as such, but utilised it in other ways, such as making ghee. As to the period from April 1 to the end of the year, the trial judge held that the respondents were able to sell their milk and thereby suffered no loss. On appeal it was contended for the appellant, inter alia, that the judge had erred in holding that he was not entitled to terminate the contract, that the sum of Shs. 3,394/30 awarded was in the nature of special damages and should have been pleaded and that the respondents had failed to mitigate the damage suffered by them.

Held –

- (i) (per Sir Ronald Sinclair, P., and Crawshaw, J.A., Sir Trevor Gould dissenting): Since the respondents had not been warned and the milk was to all appearances in sound condition at the time of delivery to the appellant, the appellant was not entitled to conclude that the respondents no longer intended to be bound by the clauses as to quality; nor was the appellant entitled to suppose that had notice been given to the respondents of the defective milk there would have been subsequent breaches by them;
- (ii) special damage should have been pleaded, but in the circumstances no prejudice was caused to the appellant by the failure to do so;
- (iii) as regards mitigation of damage the judge was entitled to find that in all the circumstances the respondents had not acted unreasonably.

Appeal dismissed.

Cases referred to in judgment:

- (1) *Maple Flock Co. Ltd. v. Universal Furniture Products (Wembley) Ltd.*, [1934] 1 K.B. 148; [1933] All E.R. Rep. 15.
- (2) *Rhymney Railway Co. v. Brecon and Methyr Tydfil Railway Co.* (1900), 83 L.T. 111; [1900] All E.R. Rep. 582.
- (3) *Guaranty Discount Co. Ltd. v. Ward*, [1961] E.A. 285 (E.A.).
- (4) *Public Works Comr. v. Hills*, [1906] A.C. 368; [1906] All E.R. Rep. 919.
- (5) *Wallis v. Smith* (1882), 21 Ch.D. 243.
- (6) *Banco de Portugal v. Waterlow & Sons Ltd.*, [1932] A.C. 452; [1932] All E.R. Rep. 181.
- (7) *Mersey Steel and Iron Co. v. Naylor, Benzon & Co.* (1884), 9 App. Cas. 434.
- (8) *Freeth v. Burr* (1874), L.R. 9 C.P. 208.
- (9) *Millar's Karri & Jarrah Co.* (1902) v. *Weddel, Turner & Co.* (1909), 100 L.T. 128.
- (10) *Robert A. Munro & Co. v. Meyer*, [1930] 2 K.B. 312.

(11) *Taylor v. Oakes, Roncornoni & Co.* (1922), 127 L.T. 267.

(12) *Universal Cargo Carriers Corporation v. Citati*, [1957] 2 Q.B. 401; [1957] 2 All E.R. 70; [1957] 3 All E.R. 234.

The following judgments were read:

Judgment

Crawshaw JA: This is an appeal by the defendant against a judgment of the High Court of Tanganyika in which he was ordered to pay to the respondents (the original plaintiffs) Shs. 3,394/30 damages.

The suit arose out of a contract between the parties for the supply of milk by the respondents to the appellant. The respondents, who are husband and wife, were farming 20 miles outside Arusha, and the appellant was a retailer of milk in Arusha. The agreement as signed by the parties was, in brief, that the appellant should purchase, as from January 11, 1962, all the milk produced by the respondents (with certain qualifications immaterial to the suit) for a period of one year, at a price of Shs. 2/20 per gallon payable on the 10th day of each month, subject to termination in the event of certain specified breaches of the agreement. Delivery was to be taken at the farm. I will set out the following clauses in full:

- “6. The vendors undertake to supply pure milk to the purchaser, i.e. unadulterated and free from foreign matter. If the milk supplied by the vendors is not of the quality mentioned hereinabove the purchaser shall have the right to reject the quantity supplied. The purchaser should therefore examine the milk at the time of delivery subject to para. 7 below.
7. The responsibility of the vendors for the quantity of the milk supplied shall cease after delivery to the purchaser but the responsibility for quality of the milk shall remain with the vendors until the milk shall have been tested by the purchaser at his premises in Arusha within four hours after delivery to the purchaser.
10. That either of the defaulting party in terms of para. 9 herein shall pay to the other party, a sum of £100 (one hundred pounds) as liquidated damage for every thirty days for all the unexpired period of the agreement.”

The facts as found by the learned judge were that the appellant collected the milk daily from January 11 to January 18, inclusive, after which he collected no more. On January 17 the appellant wrote a letter to the respondents which they received on January 18 in which he complained that the milk received by him that day had “not been passed through a refrigerator cooler”, but did not suggest that the milk was not of marketable quality. On January 19, the appellant failing to collect the milk, the respondents took it to him at his shop in Arusha, and he refused to accept it. Thereupon they took it to the Public Health Office where the inspector tested it and issued a certificate that it was fit for human consumption. The same day, the respondents received a letter from the appellant written on January 18 in which he said:

“I am very sorry to have to say that milk brought to me according to para. 7 really go bad within four hours after delivery. It has come to my notice from customers first on 15th and then ever since. This actually means that while you are getting your fair share I am losing both business and customers.

Though the covenant is for one year and since after but five days after business dealings I think I shall have to terminate the agreement as with effect from January 19, 1962.

Please I would be grateful if you would send this seven days’ account and I shall delivery a cheque to the same effect.”

The respondents did not send an account, but in a letter from their lawyers of January 19, denied any breach of the agreement, and held the appellant liable for the payment of that day’s consignment of milk, and warned the appellant that in the event of his continued failure to take delivery they would hold him liable “in the sum of £100 for every thirty days of such default during the unexpired period of the contract”.

The following issues were agreed at the hearing:

- (1) Was the defendant entitled to terminate the contract or not?
- (2) If he was not so entitled and was in breach, to what relief are the plaintiffs entitled?

The learned judge answered the first issue in the negative. On the second issue he found that the appellant was therefore in breach of the agreement in terminating the contract, but that the so – called liquidated damages of £100 for every 30 days under cl. 10 of the agreement was in fact a penalty and irrecoverable; against this last decision the respondents have not appealed. There has never been any dispute over the price of the milk the appellant took delivery of between January 11 and 18, a sum of Shs. 816/20 which he paid into court on filing his defence.

The first ground of appeal is that the judge erred in holding that the appellant was not entitled to terminate the contract. The reason for the termination was the alleged supply of bad milk. In his written statement of defence the appellant said:

“it were plaintiffs who were in breach by supplying unmerchantable milk between the period January 15, 1962 to January 18, 1962. The defendant complained orally and in writing and copies of his letters to the plaintiffs are hereto annexed ‘D1’ and ‘D2’.”

The letters D1 and D2 I have already referred to, the first being that of January 17, complaining only of the milk not having been through a refrigerator cooler, and the other of January 18 complaining, for the first time in writing, of milk having gone bad. The oral evidence was a matter of credibility, and the learned judge, for the reasons which he gave, did not believe that any oral complaint had been made by the appellant prior to January 19, which was the same day that the respondents received his letter of January 18. The learned judge said:

“In the circumstances, I consider, and so find as a fact, that as the defendant failed to give the plaintiffs an opportunity of discovering the cause of the milk having turned sour, and of rectifying such defect, as would have been reasonably possible, he was not entitled to treat the defective milk deliveries as a repudiation of the contract by the plaintiffs. In rescinding the agreement as he did, the defendant was in breach of contract.”

There are no grounds on which I could say that the judge was wrong in finding that the respondents first knew on January 19 of the complaint that the milk had gone bad. On the other hand there is no appeal from the finding of the judge that in fact some of the milk supplied to the appellant had gone bad and was therefore not of merchantable quality. The judge drew attention to the differences and “obvious exaggerations” in the evidence of the appellant’s witnesses as to the particulars of this, varying from the experience of one witness who complained of one day only to another who complained of “five days but not consecutively”; the judge came to no finding as to the quantity of milk which went bad or over what number of days, but from his use of the word “exaggerations” it would seem unlikely that he could have found more than three. The evidence for the appellant was that he tested the milk each morning on its arrival (what that test was is not known) and it seemed normal, but that some of his customers found it curdled on boiling, which the judge was prepared to agree could mean that it was not of merchantable quality.

Mr. Willby gave evidence for the respondents. He described himself as a “livestock research officer” connected with the development and organisation of the milk industry. He said that it was part of his duties to visit the dairy

farms in the Northern Region and elsewhere, and that towards the end of January or the beginning of February, 1962, he had visited the respondents' farm on two or three occasions. He said of it:

"Structurally and in operation the dairy is well above average in this Territory. The general level of the hygiene is high. Careful attention is paid to the cleanliness of the cows and utensils and the general operation of the dairy . . . In this farm it is cooled artificially, otherwise at that time of the year – January – it would turn sour sooner. It is most uncommon to have refrigerator coolers in this Territory. I only know of two in this region."

He said that if the milk went sour, the most likely reason would be contamination from churns, possibly caused from the water or from the air, and that it could "quite easily occur with absolutely no default or neglect". He added that, "if put on guard one could reasonably expect to find the cause". The position therefore was that on a day or days prior to January 19 the milk or some of it, good to outward appearance, had turned sour without the knowledge of the respondents who, had they been informed, might reasonably have been expected to have remedied the trouble. Instead, they were given no opportunity to do so until after the appellant had terminated the contract, when they first became aware of the complaint.

The learned judge held that ss. 16 (b) and 33 (2) of the Sale of Goods Ordinance (Cap. 214) applied to the circumstances of this case; they read as follows:

"16(b) where goods are bought by description from a seller who deals in goods of that description (whether he be the manufacturer or not, there is an implied condition that the goods shall be of merchantable quality:

"Provided that if the buyer has examined the goods, there shall be no implied condition as regards defects which such examination ought to have revealed;"

"33(2) Where there is a contract for the sale of goods to be delivered by stated instalments, which are to be separately paid for, and the seller makes defective deliveries in respect of one or more instalments, or the buyer neglects or refuses to take delivery of or pay for one or more instalments, it is a question in each case depending on the terms of the contract and the circumstances of the case, whether the breach of contract is a repudiation of the whole contract or whether it is a severable breach giving rise to a claim for compensation but not to a right to treat the whole contract as repudiated."

In considering whether "the defective deliveries of one or more instalments" of milk amounted to a repudiation, or was a severable breach of the contract, the judge referred to *Maple Flock Co. Ltd. v. Universal Furniture Products (Wembley) Ltd.* (1). The subject matter of that case was an instalment contract. The defendants claimed to rescind the contract after a single delivery, the 16th, was found to be contaminated, on the ground that the plaintiff, by making the defective delivery had repudiated the whole contract. The court held that the plaintiffs' breach was not a repudiation within the meaning of s. 31 (2) of the Sale of Goods Act, 1893 (similar to Tanganyika s. 33 (2)), and that in applying the provisions of that subsection to a particular case, the main tests to be considered are, "first, the quantitative ratio which the breach bears to the contract as a whole, and, secondly, the degree of probability that such a breach will be repeated". It was, incidentally, found at the trial in that case and taken into consideration by the court, that the plaintiffs' business was well conducted, and that the contamination complained of was extraordinary.

Counsel for the appellant complains that although the learned judge referred to the *Maple Flock* case (1), and set out the headnote in which the two tests were mentioned, he did not himself apply those tests. The judge said:

“The issue as to whether the defendant was entitled to treat the defective deliveries of milk as a repudiation of the contract, to my mind, resolves itself as a question of credibility.”

He then gave his reasons for believing that the appellant had failed, contrary to his own evidence, to warn the respondents of the defective condition of their milk prior to determining the contract on account thereof. The conclusion of the learned judge was that as the respondents had been given no opportunity to rectify a defect which it should have been reasonably possible to rectify, the appellant was not entitled to treat the contract as having been repudiated by the respondents.

Counsel for the appellant argues that failure to give opportunity for discovery was not a test in the *Maple Flock* case (1), and that the state of mind of a seller is not a material element where he sells defective goods; that he is under an absolute duty to supply them in accordance with the terms of the contract as to quality. Counsel for the appellant complains that the judge came to no finding as to the number of defective deliveries, and asks this court to say that on the evidence these were more than one, and in fact at least three. He submits that had the learned judge accepted there having been more than one default he might well, on the principles enunciated in the *Maple Flock* case (1), have come to a different decision. He further submits, as I understand him, that even a single day's defective delivery defeated the whole purpose of the contract in the instant case, which was to ensure to the appellant regular supplies to enable the latter to meet the daily demands of his customers. I can well recognise the danger the appellant was in of losing customers and goodwill should he supply them with bad milk over a period of time but the question is whether the circumstances were such that the breach or breaches amounted to a repudiation of the whole contract or gave rise only to a demand for compensation. In Chitty on Contracts (22nd Edn.) Vol. 1, para. 1266, it is said:

“Short of refusal, the principle is to ascertain whether the action of the breaker is such as to entitle the other party to conclude that the breaker no longer intends to be bound by its provisions. For this purpose the failure to perform must defeat the whole object of the contract so as to amount to a complete repudiation by the party in default of his obligations under it. So in *Millar's Karri and Jarrah Co. v. Weddell, Turner & Co.* (9) it was held that, while a breach of one stipulation does not generally put an end to the contract, still the purchaser will be discharged if, having regard to the size of the defective delivery and other circumstances, he has reasonable grounds for supposing that similar breaches will be committed with regard to subsequent instalments and that the goods taken as a whole will be substantially different from those which he contracted to buy. The same principle is applicable where it is the buyer who is in default. But the further the parties have proceeded with the performance of the contract, the more difficult it is to infer that a breach represents a complete repudiation of it.”

The first part of this quotation is based on the judgment of Lord Alverstone, M.R., in *Rhymney Railway Co. v. Brecon and Merthyr Tydfil Railway Co.* (2).

Repudiation by a party might consist of a deliberate act or the expression of a positive intent or it might be negative in the sense that the party allows the breaches to occur through disregard of his obligations. In the instant case, the default or defaults certainly occurred within a few days of the commencement of the contractual period, but on the other hand there was nearly a year's daily

consignments outstanding, and on the first test in the *Maple Flock* case (1) the quantitative ratio which the breach or breaches bore to the whole was very small indeed; the quantitative test must however be related to the nature of the contract and, as I have said, a daily retailer of milk is in a rather special position. As to the second test, the degree of probability that the breach will be repeated, in the *Maple Flock* case (1) one of the matters which the court took into account was the fact that the persons in breach had been warned of the defective quality of the goods and, the court having accepted that their business was carefully conducted, said it could not reasonably be inferred that similar breaches would occur in regard to subsequent deliveries. In the instant case there was unchallenged evidence that the respondents' dairy structurally and in operation was well above average, with a high level of hygiene and careful attention to cleanliness in general. There was no evidence at all from which it might be inferred that the respondents, had they been informed, would not have been able clearly to demonstrate that they had no intention whatever of repudiating any of their obligations, for the evidence was that having been put on their guard they could reasonably expect to find the cause of the milk turning sour. Not having been warned, and the milk being to all appearances in sound condition at the time of delivery to the appellant, the appellant was not in all the circumstances entitled, in my opinion, to conclude that the respondents no longer intended to be bound by the provisions of the contract as to quality or to suppose that on notice being given to the respondents of the defect subsequent breaches would be committed. There was no legal requirement for the appellant to give notice of the defects, but his knowledge that the respondents would not know thereof unless he told them disentitled him, in my opinion, to assume any adverse intention of the respondents or their inability to comply with the provisions of the contract. He admittedly might reasonably expect a continuation of the breach, but I do not think that a party to a contract can sit back and mutely watch the other party unknowingly commit a continuing breach of contract and then be heard to say that the breaches collectively amount to a repudiation of the contract.

I do not think it can be said that the learned judge did not apply the above two tests. He certainly must have had them in mind for they appear in the part of the *Maple Flock* (1) report quoted by him. In saying it was a question of credibility, I understood him, in the context of his judgment, to mean that if the appellant was to be believed when he said he had informed the second respondent of the milk going bad three days before he terminated the contract, then on the defect not being remedied during the following days it might reasonably be inferred that the breaches would continue. In believing the second respondent when she said she had not been so informed, I understood the judge to be saying that no such inference was in the circumstances justifiable; the respondents were first made aware of the complaint on January 19, the day the contract was terminated, and the learned judge says that there would be a reasonable prospect of the defect in the milk being remedied. Whether there was a repudiation is a question of fact, and I do not think the learned judge came to a wrong conclusion thereon.

The second ground of appeal complains that the judge was wrong to have admitted evidence of the "actual damages" as such were not pleaded. The plaintiff asked for the Shs. 816/20 already referred to, and Shs. 22,000/- "as liquidated damages for the unexpired period of the Agreement", the latter sum being based on the penalty cl. 10. In his written statement, the appellant maintained that the Shs. 22,000/- was "penal and not actual", to which in their reply the respondents merely joined issue. The learned judge in considering the question of damages and penalty referred to ss. 73 and 74 of the Indian Contract Act, but it seems that the law in force at the relevant time was the Law

of Contract Act No. 1 of 1961. The subsections of ss. 73 and 74 of that Ordinance are similar, however, to the respective paragraphs of ss. 73 and 74 of the Indian Contract Act and the relevant subsections read as follows:

“73(1) When a contract has been broken, the party who suffers by such breach is entitled to receive, from the party who has broken the contract, compensation for any loss or damage caused to him thereby, which naturally arose in the usual course of things from such breach, or which the parties knew, when they made the contract, to be likely to result from the breach of it.

.....

“(4) In estimating the loss or damage arising from a breach of contract, the means which existed of remedying the inconvenience caused by the non-performance of the contract must be taken into account.

“74(1) When a contract has been broken, if a sum is named in the contract as the amount to be paid in case of such breach, or if the contract contains any other stipulation by way of penalty, the party complaining of the breach is entitled, whether or not actual damage or loss is proved to have been caused thereby, to receive from the party who has broken the contract reasonable compensation not exceeding the amount so named or, as the case may be, the penalty stipulated for.”

The judge said:

“The plaintiffs’ loss falls to be considered under two heads. The loss actually sustained by them during the period from January 19, when the agreement was broken, to the end of March, and for the period from April 1, to the end of the year, the contract being due to run until the end of the year, . . .”

The judge then went on to point out that during the first period the respondents did not sell their milk as such, but utilised it in other ways, such as for making ghee. The respondents kept books of account covering this period which showed that, compared with the contract price they would have obtained from the appellant, they had sustained a loss of Shs. 3,394/30, which, as I have said, was the sum the court awarded to the respondents. As to the second period, the learned judge found that the respondents had been able to sell their milk, and could be expected to continue to sell their milk, at a price which would result in no loss on the appellant’s contract price, and so awarded no damages; there has been no appeal against that decision.

Counsel for the appellant in his final address to the trial court did not attack the plaintiff on its failure to plead special damage, nor in his judgment did the learned judge refer to the matter. The reason no doubt was that when the first respondent commenced to give evidence of the actual loss he had suffered, defence counsel objected on the ground that it should have been pleaded, but without hearing argument the learned judge merely observed, “Objection over-ruled”, and the evidence proceeded.

Special damage must be pleaded, and counsel for the respondents conceded that the Shs. 3,394/30 was in the nature of special damage. He relied, however, on s. 74(1) (*supra*) as giving the court power to award “reasonable compensation” where a penalty only is pleaded. Both counsel referred to *Guaranty Discount Co. Ltd. v. Ward* (3), where pleadings in relation to s. 74 of the Indian Contract Act were considered. The case concerned a motor car hire purchase agreement. The hirer defaulted in payment of instalments and the owner brought an action for, *inter alia*, Shs. 7,081/- as “agreed depreciation”, as under the provisions of a clause in the agreement he was apparently entitled to do. The

hirer contended that it was a penalty clause and not one for liquidated damages. The trial judge so found and dismissed the claim for liquidated damages. In the absence of any amendment to the plaint he refused to hear evidence of actual damage, as the only issue framed was whether the clause was a penal one. He observed that the plaintiff was endeavouring to put forward a case which the defendant was not in a position to meet and of which he had no notice. On appeal this court held that the judge should have heard the evidence (reframing the issues if necessary) and should have assessed reasonable compensation under s. 74, and the case was remitted for his to be done.

Counsel for the respondents relies on the *Guaranty Discount* case (3), but counsel for the appellant seeks to draw a distinction between it and the instant case in that in the former the hirer knew that he had to meet a claim for depreciation, whereas in the instant case the appellant was taken by surprise, not knowing that he would have to meet a claim based on the manufacture of ghee, dried milk, etc. To that counsel for the respondents says that counsel for the appellant is confusing loss with mitigation, and that the appellant should have anticipated total loss, the use to which the respondents put their milk being in mitigation thereof. Gould, J.A. (as he then was) in his judgment in the *Guaranty Discount* case (3), with which the other members of the court agreed, said, ([1961] E.A. at p. 289):

“Under s. 74 of the Indian Contract Act the position seems to be quite clear. If the contract is broken, where there is a sum expressed in the contract to be payable on such breach, whether it would be deemed either liquidated damages or penalty, the result which follows is the same; in either case the court will award reasonable compensation not exceeding the amount named. In the judgment of the Privy Council in *Bhai Panna Singh v. Bhai Arjun Singh* (1929), A.I.R. P.C. 179 at p. 180 is the following passage:

‘The effect of s. 74 Contract Act of 1872, is to disentitle the plaintiffs to recover simpliciter the sum of Rs. 10,000 whether penalty or liquidated damages. The plaintiffs must prove the damages they have suffered.’

“I read that as meaning that though the plaintiffs sue to recover the sum named, they may obtain judgment for only the damage proved. The passage of course does not purport to deal fully with s. 74, which contains the words, ‘whether or not actual damage or loss is proved to have been caused thereby’. I think that when action is brought to recover the sum named no further nicety of pleading is required to enable the court to give effect to the section, all questions arising thereunder flowing as a matter of law from the claim. The case of an action on a covenant for interest may be taken as an example. If the sum claimed is found to be a penal sum the plaintiff is not barred from recovering at a lower rate. Such a position arose in *Sundar Koer v. Sham Krishen* (1906), 34 I.A. 9, in which their Lordships of the Privy Council said, at p. 18:

‘The principal appellant (the mortgagor) argues that the increased interest ought therefore to be disallowed altogether. But this is not what the statute prescribes. It directs that the party complaining of the breach shall receive from the party who has broken the contract reasonable compensation, not exceeding the amount of the penalty stipulated for.’”

Gould, J.A., earlier in his judgment had considered the English law on the subject, and after reviewing certain authorities, and finally *Public Works Comr. v. Hills* (4), said:

“This case appears to support what I understand to be the law in England; that is, when a plaintiff sues, after breach of a contract, upon such a clause

as cl. 11 he is suing for agreed or liquidated damages. The court will determine whether the sum sued for is in fact a pre-estimate of damages or a penalty. If the former judgment will be given for that amount; if the latter, judgment will be given, not for the liquidated amount claimed but for an amount representing what has been proved. His suit is for pre-estimated damages, but if the court holds that the amount named is not a genuine pre-estimate, it is not precluded from giving judgment for the actual damage up to the amount claimed.”

The learned Justice of Appeal had earlier said, “His suit is for the sum payable under the agreement” and although with reference to the case of *Wallis v. Smith* (5) he expressed the view that it would no doubt be ideal to include in a plaint an alternative claim for damages proved, it is clear that he did not, in the circumstances of the *Guaranty Discount* case (3) anyway, regard this as essential. He observed that the written statement of defence in fact indicated that the hirer would not have been taken by surprise had evidence of actual damage been taken. It is clear from the judgment of Gould, V.-P. in the instant case that in his judgment in the *Guaranty Discount* case (3), he was not intending to depart from the general rule that actual damages should be pleaded, but was merely saying that from the pleadings in that case it was shown that the defendant was not taken by surprise. Although I personally feel some doubt as to the inability of the court to hear evidence in any event for the purposes of s. 74 (1), (in view of the provisions of that section, the history of claims based on penalties, and the English authorities) even though the so-called liquidated damages are held to be a penalty and special damages are not pleaded, but I am of course bound by the *Guaranty Discount* case (3) if that is construed as holding otherwise. As to the element of surprise in the instant case, however, no application was made by the appellant for an adjournment to meet the evidence after the close of the respondent’s case, although after the appellant gave evidence there was a twelve days’ adjournment to inspect the respondents’ books and the first respondent was then called for further cross-examination by the appellant before further evidence was called for the appellant. I do not therefore think that the appellant suffered any prejudice, and that the evidence was properly admitted.

The third and fourth grounds of appeal were taken together and were to the effect that during the period January 19 to March 31, 1962, the respondents failed to mitigate damages to the extent that they did not sell the milk in the market rather than convert it into ghee and casein as they did. The learned judge considered the evidence of both parties and said:

“Mr. Hunt stated that there was a glut of milk at the time. Although there is some evidence that Mr. Hunt was approached by prospective purchasers of milk who were willing to enter into contracts with the plaintiffs for the purchase of their milk, the evidence, to my mind, does not establish that the plaintiffs could, in fact, during the period under review, have entered into a contract for the sale of their milk, on terms as beneficial as in their contract with the defendant.”

Actually it was Mrs. Hunt who referred to the glut of milk, and not Mr. Hunt. The casein venture was a failure, and one of which the respondents had virtually no experience, and they ceased production of it on March 7. Counsel for the appellant at the trial described it as a “fancy experiment” at the expense of the appellant which the respondents were not justified in carrying out. As to ghee, the judge observed that there was a variance in the evidence of the parties as to particulars of its manufacture and prices, but he came to no finding thereon. He was satisfied with the total loss shown by the respondents’ books during the period in question. As to the methods they adopted in mitigation, he found

that they had not acted unreasonably in the circumstances. The burden of proving that a plaintiff should have taken steps in mitigation which he failed to do is on the defendant, and whether a plaintiff has satisfied the duty to mitigate is a question of fact.

From the respondents there was evidence that on the date of termination of the contract milk could have been sold in the market but at a lesser price and that there were transport difficulties; that they received an offer for their milk collected at the farm of Shs. 2/10 per gallon (as against the appellant's price of Shs. 2/20) which they did not accept (it is not clear whether the length of contract was an influencing factor); that in February or March they received a conditional offer at a higher price, but the condition was not fulfilled; that the manufacture of casein from skimmed milk started on January 1, and was not therefore a venture commenced as a result of the breach of contract; that after the manufacture of casein ceased the skimmed milk was given to the calves and credited at the price the respondents had previously been selling skimmed milk. It would seem that the learned judge accepted the respondents' evidence, as he was entitled to do. The first respondent also said in cross-examination,

"I agree that the proceeds from the sale of ghee and butter gave me Shs. 1/50 per gallon of milk. If all the milk had been turned into butter the proceeds would have been Shs. 2/- per gallon of milk."

No question was put to him why he did not therefore make butter to the exclusion of ghee. It may have been for instance something connected with the manufacture of butter, or that there was a limited demand for it; the onus was on the appellant to satisfy the court otherwise. Far from making a point of this difference in price, counsel for the appellant in his final address to the trial court said:

"If the plaintiffs had not gone into such experiments as to casein he would have got Shs. 1/50 per gallon on converting the milk into ghee and butter."

The question is whether on the above facts the learned judge was right in saying that the respondents did not act unreasonably. Counsel for the appellants submitted that he did not appear to have had in mind s. 51 of the Sale of Goods Ordinance which makes provision for damages for non-acceptance of goods. The section deals however only with general damages (Chalmers Sale of Goods (13th Edn.) at p. 148). This section was not the basis on which the second issue was argued in the lower court; anyway I doubt if the method of assessment contained in sub-s. (3) would be readily applicable to a contract for daily consignments over a long period of time, and therefore whether the "measure of damages is prima facie to be ascertained" in that way. In *Banco de Portugal v. Waterlow & Sons Ltd.* (6) [1932] A.C. 452 at p. 506 Lord Macmillan said as follows:

"Where the sufferer from a breach of contract finds himself in consequence of that breach placed in a position of embarrassment the measure which he may be driven to adopt in order to extricate himself ought not to be weighed in nice scales at the instance of the party whose breach of contract has occasioned the difficulty. It is often easy after an emergency has passed to criticise the steps which have been taken to meet it, but such criticism does not come well from those who have themselves created the emergency. The law is satisfied if the party placed in a difficult situation by reason of the breach of a duty owed to him has acted reasonably in the adoption of remedial measures and he will not be held disentitled to recover the cost of such measures merely because the party in breach can suggest that other measures less burdensome to him might have been taken."

In retrospect, the respondents might have been wiser to have accepted a slightly lower price for their milk, as such, rather than to have converted it; but I do not think that one can say the learned judge was wrong to find that in all the circumstances they did not act unreasonably.

The final ground of appeal is that as the respondents' claim of Shs. 22,816/20 was reduced by the judge to Shs. 4,210/50, he ought to have awarded four-fifths of the costs against them. The trial court appears to have heard no argument as to costs, and to have awarded them to the respondents without comment. Subsequent to delivery of judgment the court recorded (counsel approving): "Order. The costs awarded are to be taxed on the amount, i.e. Shs. 3,394/30 awarded".

Rule 43 of the Advocates' Remuneration and Taxation of Costs Rules (Booklet 9, Vol. 1, Applied Laws), which both counsel agreed applied, reads:

"43. In causes or matters which having regard to the amount recovered or paid in settlement or the relief awarded could have been brought in a resident magistrate's or other subordinate court costs on the scale applicable to subordinate courts only shall be allowed unless the judge at the trial otherwise orders.

"This rule shall only apply to contract cases."

Counsel for the appellant submitted that when the learned judge said "to be taxed" he meant "to be fixed according to the subordinate court scale". Counsel agreed that in making the order after judgment the judge was not recording a consent order, but was purporting to clarify what he had meant in his judgment. Counsel for the appellant does not ask for apportionment of costs if they are to be on the subordinate court scale. Counsel for the respondents submitted that the fact that the judge ordered the costs to be taxed showed that he was ordering them to be on the High Court scale, as costs in the subordinate court are not taxed (r. 36 (2)).

It must be assumed that the judge was fully aware that costs in the subordinate court are not taxed and, therefore, that by ordering the costs to be taxed he intended them to be on the High Court Scale. But in the High Court it seems that the amount claimed or recovered has ordinarily no bearing on the quantum of the costs. It may be that he intended to make a proportionate order, but I cannot believe that in saying that costs were to be taxed on Shs. 3,394/30 he meant a strictly proportional amount relating that sum to the Shs. 22,000/- claimed. The order is, to my mind, incomprehensible, and in the circumstances I think it is open to this court to make such order as is just and proper. I would set aside the order of the learned judge and substitute an order that the respondents' costs be taxed on the ordinary High Court scale, and that the appellant pay two thirds thereof. Subject to this variation of the order as to costs in the court below, I would dismiss the appeal with costs.

Sir Ronald Sinclair P: The facts as found by the trial judge have been fully set out in the judgment of Crawshaw, J.A., and it is unnecessary to restate them.

The first question which arises is whether the appellant was entitled to terminate the contract. It is common ground that s. 33 (2) of the Sale of Goods Ordinance (Cap. 214) applies in the circumstances of this case. That subsection is in the same terms as sub-s. (2) of s. 31 of the English Sale of Goods Act, 1893. In *Maple Flock Co. Ltd. v. Universal Furniture Products (Wembley) Ltd.* (1), the Court of Appeal, referring to s. 31 (2) of the English Act, said that it

"requires the court to decide on the merits of the particular case what effect, if any, the breach or breaches should have on the contract as a whole."

They pointed out ([1934] 1 K.B. 155) that the language of the subsection is substantially based on the language used by Lord Selborne, L.C., in *Mersey Steel and Iron Co. v. Naylor, Benzon & Co.* (7), where he said:

“I am content to take the rule as stated by Lord Coleridge in *Freeth v. Burr* (8), which is in substance, as I understand it, that you must look at the actual circumstances of the case in order to see whether the one party to the contract is relieved from its future performances by the conduct of the other; you must examine what that conduct is, so as to see whether it amounts to a renunciation, to an absolute refusal to perform the contract, such as would amount to a rescission if he had the power to rescind, and whether the other party may accept it as a reason for not performing his part.”

They referred to *Freeth v. Burr* (supra) in which Lord Coleridge, C.J., stated the true position to be: “whether the acts and conduct of the party evince an intention no longer to be bound by the contract”, and continued (1) ([1934] 1 K.B. at p. 155):

“These were both cases of breach by the buyer in not making punctual payment, and in each case it was clear that the buyer had some justification for the course he took. The case of breach by the seller in making defective deliveries may raise different questions. Lord Selborne in the passage above quoted did not refer to any question of intention, but said that what is to be examined is the conduct of the party. Lord Coleridge in *Freeth v. Burr* (8) citing *Hoare v. Rennie* (1859), 5 H. & N. 19 on the question of a seller’s breach states thus one aspect of the rule: ‘Where by the non-delivery of part of the thing contracted for the whole object of the contract is frustrated, the party making default renounces on his part all the obligations of the contract’. In other words, the true test will generally be, not the subjective mental state of the defaulting party, but the objective test of the relation in fact of the default to the whole purpose of the contract.”

After considering *Millar’s Karri and Jarrah Co. (1902) v. Weddel, Turner & Co.* (9), *Robert A. Munro & Co. v. Meyer* (10), and *Taylor v. Oakes, Roncoroni & Co.* (11), they came to the following conclusion:

“With the help of these authorities we deduce that the main tests to be considered in applying the subsection to the present case are, first, the ratio quantitatively which the breach bears to the contract as a whole, and secondly the degree of probability or improbability that such a breach will be repeated.”

Millar’s Karri and Jarrah Co (1902) v. Weddel, Turner & Co. (9), was a case where the contract being for 1,100 pieces of timber, the first instalment of 750 pieces was rejected by the buyers: an arbitrator awarded

“that the said shipment was, and is, so far from complying with the requirements of the contract as to entitle the buyers to repudiate and to rescind the whole contract, and to refuse to accept the said shipment and all further shipments under the said contract.”

The court upheld the award. Bigham, J., said this (100 L.T. at p. 129):

“Thus, if the breach is of such a kind, or takes place in such circumstances as reasonably to lead to the inference that similar breaches will be committed in relation to subsequent deliveries, the whole contract may there and then be regarded as repudiated and may be rescinded. If, for instance, . . . a seller delivers goods differing from the requirements of the contract, and does so in such circumstances as to lead to the inference that he cannot,

or will not, deliver any other kind of goods in the future, the other contracting party will be under no obligation to wait to see what may happen; he can at once cancel the contract and rid himself of the difficulty.”

That decision was followed in *Robert A. Munro & Co. v. Meyer* (10) where under a contract for the sale of 1,500 tons of bone meal, 611 tons were delivered which were seriously adulterated. The sellers were middlemen, who relied on their suppliers, the manufacturers, for correct delivery. When the buyers discovered that the deliveries did not conform to the contract they claimed that they were entitled to treat the whole contract as repudiated by the sellers. Wright, J., as he then was, said this ([1930] 2 K.B. at p. 331:

“In cases like *Mersey Steel and Iron Co. v. Naylor Benzon & Co.* (7), the question is first whether or not the seller or the party in default had an intention no longer to be bound by the contract. The question was thus stated in one case: Did he evince an intention no longer to be bound by the contract? No doubt the plaintiffs here had no intention to break the contract, but in my opinion in such a case as this, where there is a persistent breach, deliberate so far as the manufacturers are concerned, continuing for nearly one-half of the total contract quantity, the buyer, if he ascertains in time what the position is, ought to be entitled to say that he will not take the risk of having put upon him further deliveries of this character, and will not accept the position that he must always be watchful and analyse the goods that are delivered to see whether or not they answer to the contract. My conclusion is that in such circumstances the intention of the seller must be judged from his acts and from the deliveries which he in fact makes, and that being so, where the breach is substantial and so serious as the breach in this case and has continued so persistently, the buyer is entitled to say that he has the right to treat the whole contract as repudiated.”

In *Taylor v. Oakes, Roncoroni & Co.* (11), after certain deliveries had been made under the contract and accepted and paid for by the buyers, the buyers stopped delivery of the balance of the goods and refused to accept them. At that time the buyers were not aware of, and did not suggest any ground as a justification of their refusal. It was found that the goods in fact in a slight but appreciable degree failed to comply with the contract description and that the buyers could have rejected them if they had ascertained that fact in time. The trial judge, Greer, J., as he then was, and the Court of Appeal held that the breach of contract in respect of the instalments delivered and accepted was a severable breach, and not a repudiation of the whole contract. In the course of his judgment Greer, J., said:

“... no complaint had in fact been made, and non constant that if the defendants had asked for a better compliance with the contracts the plaintiffs might not have been able to improve their further deliveries so as to make them a strict compliance with the contracts.”

In *Robert A. Munro & Co. v. Meyer* (10), Wright, J., after referring to that passage observed ([1930] 2 K.B. at p. 332):

“But I think that is a different case from the present one; the breach of contract in this case is very substantial, and I think it would be a very large assumption to assume that it could have been put right or that there was any guarantee as to what would happen in the future.”

In *Universal Cargo Carriers Corporation v. Citati* (12) ([1957] 2 Q.B. at p. 436), Devlin, J., as he then was, stated the law as follows:

“A renunciation can be made either by words or by conduct, provided it is clearly made. It is often put that the party renouncing must ‘evince

an intention' not to go on with the contract. The intention can be evinced either by words or by conduct. The test of whether an intention is sufficiently evinced by conduct is whether the party renouncing has acted in such a way as to lead a reasonable person to the conclusion that he does not intend to fulfil his part of the contract."

The difficulty lies in the application of those principles to the circumstances of the present case and, particularly so, when the trial judge made no finding as to the number of days on which the milk went bad. The appellant's own testimony was that the milk went sour on four consecutive days from January 15 to 18, that his customers brought back the milk saying it had gone bad after one or two hours and that he had to exchange the milk they returned. The evidence of the appellant's witnesses on this aspect of the case is summed up in the following passage in the judgment:

"There are discrepancies in the evidence of the defendant's employees, the driver and the turnboy, and the several customers called. Thus the driver said that the milk was bad on four days; the turnboy said that the customers complained on five days. One customer said that her milk went bad on three or four days; two customers said that it went bad on three or four days; two customers said that it went bad on three continuous days, whilst another said that it was bad on five days, but not consecutively, that: 'the five-days were not consecutive, one day it was good milk, one day bad milk, one day good milk, etc.' Yet another customer, Timothy Udongo (D.W.7), who, incidentally, wrote the letters Exhibits D.3 and D.4 for the defendant, stated that his milk went sour, but only on one day. Though he apparently insisted on getting other milk. It does seem a little odd how this last witness remembered that the date was the 15th January."

The learned judge went on to say:

"However, despite the discrepancies and obvious exaggerations on the part of some or other of the witnesses, I am satisfied and so find as a fact, the that milk supplied by the plaintiffs did, in fact, go bad."

Later in his judgment he referred to "the defective deliveries of one or more instalments".

All the defence witnesses except one, therefore, testified that the milk went bad on at least three days. Notwithstanding the judge's reference to discrepancies and exaggerations, I think the preponderance of the evidence establishes that the milk went bad on at least three of the eight days on which milk was delivered to and accepted by the appellant. That was a substantial proportion of the total quantity supplied.

By virtue of s. 16 (b) of the Sale of Goods Ordinance there was an implied condition in the contract that the milk supplied would be of merchantable quality and it was not disputed before us that milk which went sour an hour or two after delivery was not of merchantable quality. Each supply of bad milk was accordingly a separate breach of the contract.

To my mind the crux of the matter is whether in the circumstances an inference could reasonably be drawn that the supply of bad milk would be likely to continue to an extent that the whole object of the contract would be frustrated. To put it another way, could an inference reasonably be drawn that the defect could or would not be remedied by the respondents before the whole object of the contract was frustrated?

As to the cause of the milk turning sour Mr. Willby whose evidence was accepted by the learned judge, said this:

“If the milk did go sour as complained, the most likely cause would have been contamination from churns. There might have been some chance infection even on two days. It would have been caused from the water or even from the air, if there was some nearby source of contamination. It could quite easily occur with absolutely no default or neglect. If put on guard one could reasonably expect to find the cause of the milk turning sour.”

He also said that the respondent’s dairy structurally and in operation was well above average, with a high level of hygiene and careful attention to cleanliness in general. Furthermore, it is, I think, a matter of common knowledge that the cause of the milk turning sour could in all probability be ascertained. In those particular circumstances I do not think that the appellant was entitled to infer, without giving the respondents an opportunity of ascertaining the source of the contamination, that they could not or would not remedy the defect quickly before the whole object of the contract was frustrated. In other words, I do not think that the conduct of the respondents was such as to lead a reasonable person to the conclusion that they did not intend to fulfil their part of the contract. The position would, no doubt, have been different had the respondents continued to supply bad milk after they had been warned. I agree therefore, that in the circumstances the appellant was not entitled to terminate the contract.

With regard to the second ground of appeal, I have had the opportunity of reading the judgment prepared by Gould, V.-P. For the reasons given by him, I agree that the special damages should have been pleaded, but that in the circumstances no prejudice was caused to the appellant by the failure to do so.

As to the remaining grounds of appeal, I agree with the reasoning and conclusions of Crawshaw, J.A.

The appeal is accordingly dismissed with costs subject to the variation of the order for costs in the High Court proposed by Crawshaw, J.A. and there will be orders in the terms proposed by him.

Sir Trevor Gould JA: The facts are fully set out in the judgment of the learned Justice of Appeal and there is no need to repeat them.

On the question whether the appellant was entitled to repudiate the contract I have the misfortune to have reached a conclusion which differs from that of the other members of the court. I agree with the submission of counsel for the appellant that the decision of the learned judge in the High Court had its essential basis in the failure of the appellant to complain to the respondents of the unmerchantable quality of the deliveries of milk. I will quote three short passages from his judgment:

“However, despite the discrepancies and obvious exaggerations on the part of some or other of the witnesses, I am satisfied and so find as a fact, that the milk supplied by the plaintiffs did in fact, go bad.

The onus is on the defendant to satisfy the court that he, in fact, complained to Mrs. Hunt of the milk having gone sour. He has failed to discharge such onus.

In the circumstances, I consider, and I so find as a fact, that as the defendant failed to give the plaintiffs an opportunity of discovering the cause of the milk having turned sour, and of rectifying such defect, as would have been reasonably possible, he was not entitled to treat the defective milk deliveries as a repudiation of the contract by the plaintiffs. In rescinding the agreement as he did, the defendant was in breach of contract.”

It is my reading of those passages and of the judgment as a whole that the finding of the learned judge as to the number of deliveries which went bad, though not specifically expressed, was that there was a sufficient proportion to justify

recession had complaint been promptly made and the defect not remedied. Had the learned judge been satisfied that only a single delivery had been proved unmerchantable, I do not think he would have found it necessary to embark upon consideration of the question of complaint, but would merely have said that a single delivery was insufficient to support an inference that future deliveries would be defective. I agree with the learned President that it must be accepted that something approaching 50 per cent. of the eight deliveries were bad. That, in my view, and I think in the opinion of the trial judge (apart from the question of complaint) was sufficient to justify a belief on the part of the appellant, as a reasonable man, that there was a high degree of probability that the breach would continue.

Was it incumbent upon the appellant to complain before treating the contract as broken? There is certainly no rule of law that he must do so. In my opinion such a concept is foreign to the law in relation to sale of goods e.g. if a short delivery of goods is made by a vendor the purchaser does not under s. 32 (1) of the Sale of Goods Ordinance (Cap. 214) have to communicate with the vendor so as to give him an opportunity of making the delivery up to the amount contracted for before rejecting the goods delivered. He may reject them forthwith. Therefore I think that in an instalment contract any finding that complaint must be made by a purchaser can only be justified in circumstances in which it should be clear to the purchaser that a complaint would in all probability result in rectification of the fault without further loss to the purchaser.

It is in relation to this question that I perhaps differ from my brethren in the degree of emphasis to be placed upon the nature of the business which was being conducted by the appellant. A retail milk-vendor is faced with an immediate loss of custom if he supplies bad milk and has no firm expectation of regaining his customers even if he later remedies the fault. In this respect the present case is widely different from all those which have been quoted as relevant authorities including *Maple Flock Co. Ltd. v. Universal Furniture Products (Wembley) Ltd.* (1), and other authorities referred to in the judgment of the learned President. It is almost impossible to compare periodical deliveries of rag flock, timber or iron with a daily supply of milk. The case of *Taylor v. Oakes, Roncoroni & Co.* (1), may provide some support for the case of the respondents in that judgment of Greer, J., (127 L.T. at p. 268) contains the following passage:

“This finding, however, does not conclude the case in the defendants’ favour. The defendants accepted and paid for the 600 kilos that were delivered, and they refused to take the balance without any reference to or knowledge of any defects in the delivered goods. The junior partner in the plaintiff’s firm, in effect, admitted that if the deliveries had not been stopped the balance would, in the ordinary course, have gone forward, of the same quality as the deliveries already made. But no complaint had in fact been made, and non constat that if the defendants had asked for a better compliance with the contracts, the plaintiffs might not have been able to improve their further deliveries so as to make them a strict compliance with the contracts. The defective deliveries, though they did not strictly comply with the contract description, were not far short of the quality demanded by that description.”

The deliveries under the contract there in question were monthly instalments of Hatter’s fur. The defect in the goods was so slight that it had not been noticed and the real cause of the litigation was a fall in the market price. It may well be that in those circumstances the purchasers would not be justified in assuming without inquiry that a complaint would not be followed by rectification and, with a month between instalments, the question could probably have been determined before the purchaser was called upon to accept any more of

the goods. If, to conjure up an example, a vendor supplies wooden toys which should have been painted blue but were in fact painted green, the purchaser could not justifiably assume a repetition of the fault in future instalments provided he informed his vendor of the trouble.

In the present case when the appellant received the first delivery of bad milk it would be natural for him to have regard to the possibility that it was due to isolated accidental causes. When such deliveries were repeated he would be justified in assuming that the defect was due to something more than an isolated cause and in concluding that the supply would continue to be unfit for a retail business. What courses were open to him other than that of rescinding the contract? It is common knowledge, apart from the expert evidence called, that it may be possible to ascertain the cause of premature sourness in milk. But it is not a matter of certainty, particularly as to the amount of time which might be required, and I cannot think that the appellant was required to continue to accept deliveries, and risk further damage to his business while the respondents investigated. Neither could it be incumbent upon him under the contract to offer to try to find milk elsewhere while the respondents looked for the cause of the trouble. The position might well be otherwise in the case of a commodity supplied at intervals of a month or more but I think the daily supply of a perishable commodity is in quite another category. For these reasons I would conclude that the appellant was not in breach of the contract.

On the basis of this conclusion it is not strictly necessary for me to express an opinion on the other questions arising on the appeal, but I would say that had my opinion been otherwise I would be in agreement with the opinions expressed in the judgment of the learned Justice of Appeal on the questions of mitigation of damages and costs.

I would wish to add, however, a few words on the subject of the effect of s. 74 (1) of the Law of Contract Act (No. 1 of 1961) which reproduces s. 74 of the Indian Contract Act, which was the subject of consideration by this court in *Guaranty Discount Co. Ltd. v. Ward* (3). That was an action on a well known form of clause in a hire purchase agreement providing for payment, after possession has been retaken by the owner after breach of the agreement, of a sum calculated on a formula, by way of agreed depreciation.

In my judgment in that case, with which the other members of the court agreed, there are two sentences which have been adverted to by counsel in the present case. They are in ([1961] E.A. at p. 289) and read:

“I think that when action is brought to recover the sum named no further nicety of pleading is required to enable the court to give effect to the section, all questions arising thereunder flowing as a matter of law from the claim.

In the present case I should add that para. 5 of the written statement of defence at the very least, indicates that the respondent would not have been taken by surprise had the learned judge entertained the application to call evidence on the question of actual damage.”

The first of these passages had reference, not to the right of a party to an action to be made aware of the case he had to answer, but to the submission, which had been made, that to permit the introduction of evidence of actual damage by way of depreciation would be to introduce a new cause of action. The second sentence quoted indicated that the respondent had shown by his own pleading how the damage by way of depreciation should be assessed, and it was evidence on those lines that the appellant sought to adduce. In these circumstances there was no injustice in allowing the evidence to be given and it was held that the trial judge should have admitted it.

Guaranty Discount Co. Ltd. v. Ward (3) ought not in my opinion to be read as holding, in relation to s. 74 that it is never necessary to plead special damage

when a specific sum is claimed under the terms of a contract. Section 74 (1) no doubt confers a wide discretion upon the court when it is estimating what is reasonable compensation, and the words “whether or not actual damage or loss is proved to have been caused thereby”, are probably intended to convey that compensation in the nature both of general and special damages is to be considered. That discretion, however, would never be exercised so as to deprive a defendant of his basic right to know with sufficient particularity what is being claimed against him. A court would be fully entitled to disallow evidence of anything which clearly should have been pleaded or in other cases it might resort to amendment and adjournment with compensation in costs. Whenever special damages form a substantial or major portion of the total damages it must be clear to a prospective plaintiff in a territory in which s. 74 of the Indian Contract Act (or its equivalent) applies, that a court will not be able adequately to assess reasonable compensation under the section without proof of that special damage. It will be equally clear that the defendant must have notice of what it is intended to prove. In all such cases (and in most sale of goods cases, for pleading purposes, the bulk of the damage is special) there can in my opinion be no doubt that the plaintiff ought to particularise special damage and contain a prayer that it be included or considered in the reasonable compensation to be awarded under s. 74. In the present case in my opinion the special damage should have been particularised in that way, but the course of the trial indicates that no prejudice was caused to the appellant by the failure and that he had the opportunity to answer, and did answer fully, the evidence called on the question of damages.

Appeal dismissed.

For the appellant:

Adrian Roden and V. Dev Vohora, Arusha

For the respondents:

Reid & Edmonds, Arusha

M. D. Riegels

J B Kohli and Others v Bachulal Popatlal
[1964] 1 EA 219 (CAN)

Division:	Court of Appeal at Nairobi
Date of judgment:	16 March 1964
Case Number:	32/1962
Before:	Crawshaw, Newbold and Crabbe JJA
Sourced by:	LawAfrica
Appeal from:	The Supreme Court of Kenya – Wicks, J.

[1] *Practice – Parties – Misnomer – Defendant incorrectly described in plaintiff – Mistake perpetuated in*

defence – Defendant named deceased – Actual defendant a firm bearing name of deceased – Amendment.

[2] Costs – Application by plaintiff to discontinue – Application allowed without giving costs to defendants – Misnomer – Defendant named deceased – Appearance entered and defence filed by firm bearing name of deceased – Whether court’s discretion not awarding costs to defendants exercised judicially.

[3] Advocate – Costs – Order for payment by advocate personally – Order made without hearing advocate – Whether order made per incuriam.

Editor’s Summary

In December, 1959 the respondent’s advocate, on his client’s instructions, filed an action in the magistrate’s court for the price of goods sold and delivered. The plaint gave the defendant’s name as “Haji Essa Adam” and his residence as “Narok, Masai District”. Service of the plaint was accepted by one

M. Haji Issa who signed “for Haji Issa Adam”. The affidavit of service recited that service was on a “partnership firm named therein, viz. Haji Essa Adam” and that it was served on “Musa Haji Issa, a partner”. The memorandum of appearance and defence subsequently filed on behalf of the second appellant were in the name of “Haji Essa Adam”. On the day before the hearing of the case, the first appellant’s firm filed a notice of change of advocates and the first appellant personally represented the second appellants at the hearing. At the hearing counsel for the respondent, after stating that he had just discovered that “the defendant” Haji Essa Adam, had died in 1941 and that the “recent defendants” (referring to the second appellants) were relations of the deceased and trading under the deceased’s name, requested permission to discontinue the suit. In reply the first appellant, acting for the second appellants replied that “The defendants have answered for the dead man and they have been served. But the plaintiff cannot go on . . .” At this stage there was an adjournment and a few days later the magistrate gave the respondent leave to discontinue the suit but made no order as to costs because, in his opinion, the second appellants should not have accepted service or should have set out in their defence that they were not “the defendant”. The second appellants then appealed to the Supreme Court mainly on the ground that the magistrate erred in law in allowing the respondent to discontinue the suit without allowing them their costs but they also applied for amendment of the pleadings by adding “and Sons” to the name “Haji Essa Adam”. Whilst this appeal was pending the respondent applied for security for costs. The judge refused to entertain the appeal or to allow amendment of the pleadings on the ground that the appellant named was dead and not before the court, held that in consequence the appeal must be struck out and he ordered that the first appellant should bear all the costs of the proceedings because he had had no retainer from the defendant. The judge also rejected the application for security for costs made by the respondent. On appeal,

Held –

- (i) the judge erred in ordering the first appellant to pay the costs personally without first giving him the opportunity to answer the complaint against him;
- (ii) (per Crabbe and Crawshaw, JJ.A.) in all the circumstances the second appellants were justified in regarding themselves as the proposed defendants in the suit;
- (iii) (per Crabbe and Crawshaw, JJ.A., Newbold, J.A. dissenting): the failure to disclose the death of the defendant described in the plaint was not sufficient reason for the magistrate to deprive the second appellants of their costs;
- (iv) (per Crabbe and Crawshaw, JJ.A.): the magistrate was wrong in granting leave to discontinue the suite, for the case was not one in which the plaint had been issued against a non-existent person, but one of mere misnomer for which the court could allow an amendment;
- (v) the judge had erred in treating the case as against a dead man instead of one of mere misnomer;
- (vi) the judge had also exercised his discretion wrongly in depriving the second appellants of their costs on the dismissal of the respondent’s application for security for costs. per Crawshaw, J.A.: In my view no unprofessional stigma attaches to Mr. Kohli in his conduct of the proceedings, and I understand Mr. Gautama too expressed a like view and did not support the order of the learned judge.”

Appeal of the first appellant allowed without costs. Judgment and orders of the Supreme Court set aside. Second appellants to be allowed costs in the

magistrate's court, of their appeal to the Supreme Court and on dismissal of the respondent's application for security for costs, and of their appeal.

Cases referred to in judgment

- (1) *Myers v. Elman*, [1939] 4 All E.R. 484.
- (2) *Abraham v. Jutsun*, [1963] 2 All E.R. 402.
- (3) *Davies v. Elsby Brothers Ltd.*, [1960] 3 All E.R. 672.
- (4) *Whittam v. W.J. Daniel & Co., Ltd.*, [1961] 3 All E.R. 796.
- (5) *Alexander Mountain & Co. v. Rumere Ltd.*, [1953] 2 All E.R. 482.
- (6) *Etablissement Baudelot v. R.S. Graham & Co., Ltd.*, [1953] 1 All E.R. 149.
- (7) *Bushell v. Hammond*, [1904] 2 K.B. 563.
- (8) *Civil Service Co-operative Society v. General Steam Navigation Co.*, [1903] 2 K.B. 756.
- (9) *Donald Campbell & Co. v. Poilak*, [1927] A.C. 732.
- (10) *Ritter v. Godfrey*, [1920] 2 K.B. 47; [1919] All E.R. Rep. 714.
- (11) *Hong v. A. & R. Brown Ltd.*, [1948] 1 All E.R. 185.
- (12) *Baylis Baxter Ltd. v. Sabbath*, [1958] 2 All E.R. 209.
- (13) *Bhagwanji Raja v. Swaran Singh*, [1962] E.A. 288 (C.A.).
- (14) *Pearlman (Veneers) S.A. (Pty) Ltd. v. Bernhard Bartels*, [1954] 1 W.L.R. 1457; [1954] 3 All E.R. 659.

The following judgments were read:

Judgment

Crabbe JA: This is an appeal against a judgment and decree of the Supreme Court of Kenya given on April 1, 1960 at Kisumu whereby it was ordered that the appeal against the ruling of the resident magistrate be struck out and that Mr. Kohli, counsel for the appellant, do pay the whole of the costs of the proceedings personally.

The facts relevant to this appeal are set out briefly, and I think accurately, in the following passage of the judgment of the learned judge in the Supreme Court:

“The plaint in that case was filed on December 4, 1957, and this was purported to be served on December 11, 1957, being accepted by one M. Haji Issa who signed ‘for Haji Issa Adam.’ The affidavit of service recited that the service was on a ‘partnership firm named therein, viz. Haji Issa Adam’ and that it was served on ‘Musa Haji Issa a partner’. The ‘notice of service on a partner’ recited Haji Issa Adam as the defendant. On December 20, 1957, a firm of advocates named Veljee Devshi & Bakrania purported to file a memorandum of appearance on behalf of Haji Issa Adam and on January 6, 1958 the same firm of advocates purported to file a defence also on behalf of Haji Issa Adam. On March 19, 1959, M. Haji Issa signing for Haji Issa Adam, wrote that Messrs. Kohli, Patel & Raichura were acting for him and on the same day Messrs. Kohli Patel & Raichura filed a formal notice of change of advocates. On the next day, March 20, 1959, the case

came on for hearing. First there were submissions as to who was to begin and after the magistrate had ruled on this Mr. Sood, who appeared for the plaintiffs, said that he had just discovered that the defendant died in 1941 and that the 'recent defendants are relations of the deceased and are trading under the deceased's name'. He then applied to withdraw the action. The magistrate gave the plaintiff leave to discontinue the action. Mr. Kohli now seeks to appeal on behalf of Haji Essa Adam on the ground that the magistrate should have dismissed the suit with costs."

On March 8, 1960, when the appeal came before the court for hearing the learned judge having taken the firm view that the appeal had been brought in the name of a dead man refused to grant an application for amendment and stopped further argument before him.

It would appear that the proceedings were then adjourned, and on April 1, 1960, the learned judge delivered a judgment in which he said that the court had no jurisdiction to grant leave to amend the plaint and defence by adding “and Sons” to the defendant’s name, because in his view “Haji Essa Adam”, the named appellant, was not before the court. He then made these observations:

“As regards this appeal, when it became clear that Haji Essa Adam, the named defendant, was dead, and that Mr. Kohli had no retainer in the case I stopped Mr. Kohli, which was in accord with the rule in *Daimler v. Continental Tyre & Rubber Co.* (G.B.), [1916] 2 A.C. 307, which is that when the court in the course of an action becomes aware that a plaintiff (in this case an appellant) is incapable of giving any retainer at all, it ought not to allow the action to proceed. The appeal must be struck out.

Mr. Kohli having no retainer, and never having had a retainer must bear the whole of the costs of these proceedings personally.”

There can be no doubt that the Supreme Court has an inherent jurisdiction to make an order calling upon a solicitor in a case before it to pay the costs of either his client or the opposite party or both. Such punitive order can be made on the grounds of professional misconduct not amounting to so serious conduct as to justify striking his name off the role or suspending him. In *Myers v. Elman* (1), ([1939] 4 All E.R. at p. 509) Lord Wright explained the grounds on which this jurisdiction can be exercised. He said:

“The matter complained of need not be criminal. It need not involve peculation or dishonesty. A mere mistake or error of judgment is not generally sufficient, but a gross neglect or inaccuracy in a matter which it is a solicitor’s duty to ascertain with accuracy may suffice. Thus, a solicitor may be held bound in certain events to satisfy himself that he has a retainer to act, or as to the accuracy of an affidavit which his client swears. It is impossible to enumerate the various contingencies which may call into operation the exercise of this jurisdiction. It need not involve personal obliquity. The term ‘professional misconduct’ has often been used to describe the ground on which the court acts. It would perhaps be more accurate to describe it as conduct which involves a failure on the part of a solicitor to fulfil his duty to the court and to realise his duty to aid in promoting, in his own sphere, the cause of justice. This summary procedure may often be invoked to save the expense of an action.”

But before the court exercises this summary jurisdiction to mulct a solicitor in costs it must first give that solicitor an ample opportunity to meet the complaint against him and to answer it. As Lord Wright pointed out in *Myers v. Elman* (1) ([1939] 4 All E.R. at p. 508):

“All that is necessary is that the judge should see that the solicitor has full and sufficient notice of the nature of the complaint made against him, and full and sufficient opportunity of answering it.”

In this case I do not see how it can be said that Mr. Kohli’s conduct fell within Lord Wright’s definition of “professional misconduct”; but be that as it may it certainly does not appear that the learned judge before making the order as to costs made it clear to Mr. Kohli the nature of the complaint against him, neither did he ask him if he wished to say anything on the matter. In *Abraham v. Jutsun* (2), where an order was made ordering a solicitor to pay

costs personally without being given an opportunity to defend his conduct Lord Denning, M.R. said ([1963] 2 All E.R. at p. 403):

“The appellant now appeals against that order and I am afraid that the Divisional Court acted per incuriam in making the order which they did. True it is that the High Court has a summary jurisdiction over solicitors in pursuance of which they have power to order them to pay costs, if the costs have been caused by the solicitor’s misconduct. That was always the case at common law; but at common law it always was held that no such order should be made unless fair notice was given to the solicitor of the matter alleged against him as misconduct, and he was given a fair opportunity of being heard in answer.”

Harman, L.J. ([1963] 2 All E.R. at p. 404) also said:

“That the appellant was not called on to defend his conduct is enough to make it clear that this appeal must be allowed; . . .”

In my view the learned judge erred in making an order against Mr. Kohli to pay costs personally, for however reprehensible his conduct might have been he should have been given the opportunity to answer the complaint against him.

Counsel for the respondent expressed himself unable to support the learned judge’s order against Mr. Kohli and in the absence of any notice of the complaint and an opportunity to answer it I think that the appeal to set aside the order against him should be allowed.

The appeal by the second appellants raises certain difficult but interesting problems, and after listening to the very able argument of Mr. Khanna counsel for the appellant I think the main points which we have to determine are:

1. whether the description of the defendant on the plaint as “Haji Essa Adam” was a misnomer; and
2. whether the appellants were entitled to costs at all stages of the proceedings in the lower courts and that the learned resident magistrate and the learned judge of the Supreme Court both erred in making orders depriving them of such costs.

In order to determine the first point it is necessary, I think, to consider in the first place all the documents which were before the resident magistrate as well as the entire circumstances of the case at the trial court.

The action began with the filing of a plaint, the particulars of which were as follows:

“Plaintiff”s Name.	Bachulal Popatlal
Description	Merchant
Place of Residence and/or business	Bomet
Address for service	c/o R. K. Sood, Advocate, P.O. Box 758, Kisumu.
Defendant’s Name	Haji Essa Adam,
Description	
Place of Residence	Narok
and/or Business.	Narok, Masai District
Nature of claim showing cause of action and the relief claimed.	

1. The plaintiff claims from the defendant a sum of Shs. 585/- being the amount due for goods sold and delivered to the defendant at the defendant’s

request at Bomet during the year 1955 full particulars whereof have been supplied to the defendant.

2. The above amount was demanded and notice of intention to sue duly given but the defendant refuses and/or neglects to pay the same.
3. The cause of action arose within the jurisdiction of this Honourable Court.

Reasons Whereof the plaintiff prays for judgment against the defendant for the said sum of Shs. 585/- together with interest thereon at court rates and costs of this suit.

Value of subject matter of the suit Shs. 585/-

Date of Application . . . December 3rd, 1957.”

There are two significant points to note about his plaint. First, either by omission or by design, the description of the defendant was not given as the plaintiff was bound to do in accordance with normal practice. I think the probabilities are that it was by design. Second, the goods were sold and delivered to the defendant in 1955, and that before the commencement of this action full particulars of the goods sold had been supplied to the defendant.

There is nothing on record to show that the plaintiff directed service, or indicated the proper person on whom service should be effected. But the affidavit of service is in these terms:

“I, Naseem Akhtar make oath/affirm and say as follows:

Court Clerk

District Commissioners’ Office, Narok

I am a Process-Server of this court.

On the 10th day of December, 1957, I received a summons/Notice issued by the court of the resident magistrate, Kisumu, in civil Suit No. 2956 of 1957 registered in the said court dated the 4th day of December, 1957 for service on the partnership firm named therein viz. Haji Essa Adam.

A. Service on a partner in the firm.

I did on the 11th day of December, 1957 personally serve Musa Haji Essa a partner, known to me, in the above named defendant firm with a true copy of the summons at District Commissioner’s Office, Narok at about 11 o’clock in the fore-noon by tendering a copy thereof to him and requiring his signature to the original Summons.

I did, at the same time of the said service, deliver to the person, so served as aforesaid, a notice in writing, a copy of which is attached hereto, that the said writ of summons was served upon him as the person having the control or management of the partnership business of the said defendant firm, and also as a partner in the said firm.

Court Clerk

District commissioner’s office narok.

It is curious how the process-server could have assumed, if he was not told by the plaintiff that Haji Essa Adam was a firm unless it was popularly known as such.

In due course an appearance to the writ was filed on behalf of the defendant in this form:

“Memorandum of Appearance

Enter an Appearance in this action for the Defendant Haji Essa Adam Dated at Nairobi, this 19th day of December, 1957.

for Veljee Devshi & Bakrania Advocates for the Defendant.”

Notice of this appearance was given to the appellant’s advocate, as follows:

“Take Notice that Appearance has been entered in this action for the Defendant Haji Essa Adam.

Dated at Nairobi, this 19th day of December, 1957.”

The firm of advocates purporting to be acting for defendant then filed the following defence:

“Defence

1. The defendant herein admits names and description of parties hereto except that his address for service for the purpose of this suit is care of Veljee Devshi & Bakrania, advocates, Market Mansion, Bazaar Street, P.O. Box 5087, Nairobi.
2. The defendant denies owing to the plaintiff the sum of Shs. 585/- as claimed in the plaint filed herein or any other sum or at all, and puts the plaintiff to the strict proof thereof.

Reasons Wherefore the defendant prays that the plaintiff’s suit be dismissed with costs.

Dated at Nairobi this 2nd day of January, 1958.

for Velji Devshi & Bakrania Advocates for the Defendant.”

It seems to me that the admission of the “names and description of the parties thereto” was a representation that the defendant whose name appeared on the plaint in the suit was very much alive at the date the defence was filed.

On March 20, 1959 when hearing was about to begin before the resident magistrate counsel for the respondent Mr. Sood, made the following statement:

“The defendant I have discovered just now died in 1941. Recent defendants are relations of the deceased and are trading under the deceased’s name.

Request permission to withdraw.

There is no disclosure in the pleadings that these events have taken place. Plaintiff did not sue as a firm.”

I find it difficult to reconcile Mr. Sood’s opening statement with the statement in the plaint that the goods were sold and delivered to the defendant at his request at Bomet during the year 1955. Counsel for respondent confessed that he was unable to explain his apparent contradiction. It is impossible for the respondent to sell and deliver goods in 1955 to a person who had died in 1941, and if the statement in the plaint is true, and I do not see how any sane person can allege to the contrary, then in my view the intention of the respondent must have been to sue whoever received the goods in 1955, and the words of Mr. Sood:

“Recent defendants are relations of the deceased and are trading under the deceased’s name.”

seems to elucidate the position.

And it was this appellants’ firm alone which was in existence in 1955 and which alone could have ordered and received goods from the plaintiff in that year.

Those words of Mr. Sood probably explained why the process – server served the summons notice on Musa Haji Essa, a partner in Haji Essa Adam & Sons.

But the position was, I regret to say, rather made obscure by Mr. Kohli, who, instead of supporting Mr. Sood's statement that those who had appeared before the court were trading under the name of the dead man Haji Essa Adam, and then applying for leave to amend the description of the defendant in the title of the suit made this extraordinary and confused statement:

"The defendants have answered for the dead man and they were served. But plaintiff cannot go on. A partner of this firm and I witness present for defendants."

At this stage further hearing was adjourned to March 24, 1959 when the learned resident magistrate read the following ruling:

"The plaintiff has discontinued but the defendants should not have accepted service or should have set out in their defence that they were not the defendant. In the circumstances I make no order as to costs.

Leave to appeal granted.

J. Rollings, R.M.

23.4.59

Order

Leave to discontinue granted.

J. Rollings, R.M.,

24.3.59.

Against this ruling the appellants appealed to the Supreme Court mainly on the ground that the learned resident magistrate erred in law in allowing the plaintiff to discontinue the suit and depriving them of costs. Surely, if the appellants' firm was not the party wrongly described in the plaint or could not be deemed to be the defendant then the firm would have no locus standi in the suit and could not therefore consider itself aggrieved by the resident magistrates' failure to make an order as to costs.

Mr. Khanna, argued with considerable force that on the facts before the resident magistrate this was a clear case of misnomer and that the learned resident magistrate should have either amended the title of the suit suo motu or taken evidence in order to determine the real nature of the transaction. He submitted that the two main questions for the learned resident magistrate to consider were: (1) did the transaction take place and (2) did it take place with a living person? He submitted further that if it did take place then the misdescription did not matter.

Mr. Gautama, counsel for the respondent, conceded that if there was a misnomer or some technicality the plaint could be amended, and that the resident magistrate had jurisdiction to allow such amendment. But he contended in effect that the intention of the plaintiff was to sue a living man, and not a firm, and in any case the appellants by their conduct tended to perpetuate the error and therefore the learned resident magistrate was justified in depriving them of costs.

In my view the question is not whom the plaintiff intended to sue but whether a reasonable man reading all the documents in the proceedings before the resident magistrate and having regard to all the circumstances would entertain no doubt that "Haji Essa Adam & Sons" were the defendants intended to be sued by the plaintiff. If he would have no doubt as to the person to be sued it would be a case of misnomer. In *Davies v. Elsby Brothers Ltd.* (3), Devlin, L.J. proposed the following tests ([1960] 3 All E.R. at p. 676):

"The test must be: How would a reasonable person receiving the document take it? If, in all the circumstances of the case and looking at the

document as a whole, he would say to himself: 'Of course it must mean me, but they have got my name wrong', then there is a case of mere misnomer. If, on the other hand, he would say: 'I cannot tell from the document itself whether they mean me or not and I shall have to make inquiries', then it seems to me that one is getting beyond the realm of misnomer. One of the factors which must operate on the mind of the recipient of a document, and which operates in this case, is whether there is or is not another entity to whom the description on the writ might refer."

There can be no doubt on reading the plaint in this case that the transaction took place in 1955 with someone who was existing at that time. The appellants were at the time trading under the name of the person who the plaintiff intended to receive the goods. The writ was served on a partner of the appellants' firm. In all the circumstances I think the appellants were justified in regarding themselves as the proposed defendants in the suit.

Counsel for the appellants referred to the case of *Whittam v. W.J. Daniel & Co. Ltd.* (4) which I think covers the circumstances in this case. The headnotes to that case read as follows:

"On September 10, 1957, the plaintiff who was employed by W.J. Daniel & Co., Ltd., suffered an accident while at work and she was examined by a doctor on their behalf. On September 9, 1960, a writ was issued for her against 'W.J. Daniels and Company (a firm)', claiming 'damages for personal injuries sustained by the plaintiff in the course of her employment with the defendants' caused, inter alia, by 'the negligence of the defendants, their servants or agents'. At that date no firm of that name was in existence. W.J. Daniels and Company, which was a partnership firm, ceased to exist in 1919, and was then carried on by one of the partners as sole proprietor until 1931 when it was taken over by W.J. Daniel & Co., Ltd. On October 12, 1960 [i.e., after the period of limitation had expired], the plaintiff was granted leave to amend the writ by changing the name of the defendants from 'W.J. Daniels and Company (a firm)' to 'W.J. Daniel & Co., Ltd.' W.J. Daniel & Co. Ltd., applied for an order that the writ be set aside.

HELD –

- (1) the amendment was a correction of a mere misnomer since, in all the circumstances of the case, there could have been no doubt who it was that the plaintiff intended to sue.

Davies v. Elsbey Brothers, Ltd. (3) distinguished.

- (2) the mere omission of the word 'Limited' did not mean that no person was sued and that, until that was corrected, there was no defendant to the proceedings."

In his short judgment in the *Whittam v. W.J. Daniel & Co. Ltd.* case, Danckwerts, L.J. put the position which arose as concisely and in a manner that would fully dispose of the argument of counsel for respondent before us: He said:

"The present case is plainly distinguishable from the decision of this court in *Davies v. Elsbey Brothers, Ltd.* (3), because, in the present case, there is no other entity to which the description in the writ could be taken to refer. On the other hand, counsel for the defendants' argument is that it is a description which describes nothing and, therefore, is an action against nobody, and therefore, it would be improper and against the rules to put in the defendants in place of a person which did not exist. I cannot accept that argument. It seems to me that this is a case in which the description could only refer to the defendants and would not be taken by any reasonable person to refer to anybody but the defendants. In the words which were approved

by Cohen, L.J., in *Alexander Mountain & Co. v. Rumere, Ltd.* (5) ([1948] 2 All E.R. at p. 484; [1948] 2 K.B. at p. 441), there is no magic in the name of a corporation. It seems to me that the name of the defendant inserted in the writ originally was merely a misdescription which was plainly directed to the defendants and it is a case in which such misdescription can be corrected.”

In applying the above principle in this case it seems to me that the learned resident magistrate was palpably wrong in the first of his two reasons.

As regards the second reason I think it is true to say that it would have been better if the defence filed had made it appear that the defendants were existing persons wrongly described. But in my opinion that is not a good ground for allowing the plaintiff to discontinue the suit, for if this was a case of mere misnomer, and there was in my opinion sufficient material before the resident magistrate to induce him to that conclusion, then the fact that the misdescription was not corrected was immaterial as this would not affect his ultimate judgment in the case. This point was considered in *Alexander Mountain & Co. v. Rumere Ltd.* (5), in which it was decided that where a defendant does not exercise his power to compel the plaintiff to amend a mere misnomer of the plaintiff on the writ and the matter proceeds to trial, the misnomer can then be amended, and in no circumstances can that affect the ultimate and substantive judgment in the case. In his judgment Cohen, L.J. referred to an article in the Law Journal of May 9, 1942, and the penultimate paragraph of that article reads as follows:

“This was the position up to the passing of the Civil Procedure Act, 1833, s. 11 of which abolished pleas in abatement for misnomer altogether. It gave the defendant the right, instead of pleading in abatement, ‘to cause the declaration to be amended, at the cost of the plaintiff, by inserting the right name, upon a judge’s summons founded on an affidavit of the right name’. This Act is now itself repealed, and all pleas in abatement are finally abolished by R.S.C., Ord. 21, r. 1. A plaintiff, whether an individual or a corporation, is of, course, still required to bring his action in his proper name. There does not appear to be any specific rule of court dealing with the matter, nor do the rules of court deal with misnomer in any way. It, therefore, appears that R.S.C., Ord. 72, r. 2, applies; i.e., ‘the present procedure and practice’ (i.e., the practice in force when the rules of 1883 were framed) remains in force, and the defendant by summons, supported by affidavit, could compel the plaintiff to amend. If he does not do so, and the matter proceeds to trial, it is submitted that the misnomer can then be amended, and that in no circumstances could the misnomer affect the substantive judgment which the court is called upon to pronounce.”

The learned Lord Justice expressed his agreement with that statement of the law. Scott, L.J. also agreed.

In *Whittam v. W.J. Daniel & Co. Ltd.* (4), Donovan, L.J. said:

“In this case, I think there is a mere misnomer; and I do not know of any rule of law which compels us to hold that the mere omission of the word ‘Limited’ means that no person is sued at all, and that, until that is corrected, there is no defendant to the proceedings.”

In my view the second reason for which the learned resident magistrate gave leave to discontinue was also wrong, for the case is not one which the writ had been issued against a non-existent person, but one of mere misnomer for which the court could allow on amendment: see *Etablissement Baudelot v. R.S. Graham and Co. Ltd.* (6).

The vital point in this appeal is whether the learned resident magistrate was right in depriving the appellants of their costs. For the appellants it was contended that by virtue of Rule 3 of Order XXIV costs in the discontinuance

of proceedings are not in the discretion of the court; they are automatic in favour of the defendant unless there was some reprehensible conduct on his part. Counsel for the respondent on the other hand submitted that the learned resident magistrate was justified in the exercise of his discretion under s. 27 of the Civil Procedure Ordinance to deprive the appellants of costs. He argued that the appellants did not disclose in their pleadings that the defendant was dead; indeed the appellants gave the impression that the defendant on the writ was alive. Even when this mistake was discovered counsel for the defendants caused further confusion and tried to perpetuate the mistake by stating:

“The defendants have answered for the dead man and they were served.”

In order to determine this crucial point in the appeal it is necessary to examine the basic jurisdiction of the resident magistrate. The resident magistrate’s court was created under The Courts Ordinance (Cap. 10) and its civil jurisdiction is derived under s. 14 of that Ordinance. As regards procedure s. 16 states as follows:

“Subject to the provisions of this ordinance and to rules of court, all courts shall follow the principles of procedure laid down in the Civil Procedure Ordinance and the Criminal Procedure Code, so far as the same may be applicable and suitable.”

The provision as to costs in the Civil Procedure Ordinance is contained in s. 27. This section reads:

“(1) Subject to such conditions and limitations as may be prescribed, and to the provisions of any law for the time being in force, the costs of an incident to all suits shall be in the discretion of the court or judge and the court or judge shall have the full power to determine by whom and out of what property and to what extent such costs are to be paid and to give all necessary instructions for the purposes aforesaid.

The fact that the court or judge has no jurisdiction to try the suit shall be no bar to the exercise of such powers:

Provided that the costs of any action, cause or other matter or issue shall follow the event unless the court or judge shall for good reason otherwise order.

(1) The court or judge may give interest on costs at any rate not exceeding six per cent per annum and such interest shall be added to the costs and shall be recoverable as such.”

The word “prescribed” in sub-s. (1) has been defined in s. 2 of the Ordinance as meaning “prescribed by rules”.

It seems to me on consideration of both s. 16 of the Courts Ordinance and s. 27 of the Civil Procedure Ordinance that the question of costs is left in the unfettered discretion of the court or judge, except where there are any limitations or conditions imposed either by statute or by rules.

The plaintiff in the suit discontinued the action against the purported defendant with leave of the court. In the Civil Procedure (Revised) Rules, 1948, Order XXIV deals with “Withdraw, Discontinuance and adjustment of suits”. Rule 1 under this heading reads as follows:

“(1) The plaintiff may at any time before the delivery of the defendant’s defence, or after the receipt thereof before taking any other proceeding in the suit (save by interlocutory application) by notice in writing wholly discontinue his suit against all or any of the defendants or withdraw any part or parts of his alleged cause of complaint, and thereupon he shall pay such defendants costs of the suit, or if the suit be not wholly discontinued

the costs occasioned by the matter so withdrawn. Upon the filing of such notice of discontinuance such costs shall be taxed, but such discontinuance or withdrawal as the case may be, shall not be a defence to any subsequent action.

Save as in this rule otherwise provided it shall not be competent for the plaintiff to withdraw or discontinue a suit without leave of the court, but the court may, before, or at, or after the hearing upon such terms as to costs, and as to any other suit, and otherwise as may be just, order the action to be discontinued or any part of the alleged cause of complaint to be struck out.”

It is plain I think, that the saving clause of this rule gives the court an unfettered discretion in ordering terms as to costs upon discontinuance or withdrawal of an action with leave. It seems to me that a defendant has no right to costs unless the court has in its discretion made an order of costs in his favour; and it is only when such an order is made that he can enforce it under r. 3 of the Order. In my view it is not without significance that the marginal notes to r. 3 read: “Decree may be issued for costs”; and though it is true that the marginal notes do not form part of a statute, yet as Collins, M.R. pointed out in *Bushell v. Hammond* (7), some help could be derived from the sidenote to show what the section is dealing with.

I find myself in entire disagreement with Mr. Khanna’s submission that costs for the defendants were automatic after the discontinuance of the suit.

Since the resident magistrate had discretion in the award of costs this court can examine afresh the relevant facts and circumstances in order to determine whether the discretion was properly exercised.

The question of appeals as to costs has been considered in many cases, and here I wish to refer to only a few of them. In *Civil Service Co-operative Society v. General Steam Navigation Company* (8), the trial judge deprived the successful defendants of their costs because they would not submit to the learned judge himself as arbitrator, saying what in the circumstances should be done. The learned judge did not state his reasons for depriving the successful defendants of their costs. In his judgment Lord Halsbury said ([1903] 2 K.B. at p. 765):

“No doubt where a judge has exercised his discretion upon certain materials which are before him, it may not be, and I think is not within the power of the Court of Appeal to overrule that exercise of discretion. But the necessary hypothesis of the existence of materials upon which the discretion can be exercised must be satisfied.”

In *Donald Campbell & Co. v. Pollak* (9), Viscount Cave, V.-C. reviewed some of the earlier cases on the subject and then quoted the following passage from the judgment of Lord Sterndale, M.R. in *Ritter v. Godfrey* (10) ([1920] 2 K.B. at p. 52):

“This was a case tried without a jury before the judge alone, and therefore in the absence of an order by him neither party is entitled to any costs. It therefore differs from a case tried before a jury, where there is a statutory right to costs if there be no order to the contrary. But there is such a settled practice of the courts that in the absence of special circumstances a successful litigant should receive his costs, that it is necessary to show some ground for exercising a discretion by refusing an order which would give them to him. The discretion must be judicially exercised, and therefore there must be some grounds for its exercise, for a discretion exercised on no grounds cannot be judicial. If, however, there be any grounds, the question of whether they are sufficient is entirely for the judge at the trial and this court,

cannot interfere with his discretion. On the authorities as they now stand the line between cases tried before a jury and cases tried by a judge is very fine.”

The Lord Chancellor later continued (9) ([1927] A.C. at pp. 811, 812):

“My Lords, it appears to me that the true view is substantially that taken by Lord Sterndale in the above quoted passage in his judgment in *Ritter v. Godfrey* (10), although I would express it in somewhat different language. A successful defendant in a non-jury case has no doubt, in the absence of special circumstances, a reasonable expectation of obtaining an order for the payment of his costs by the plaintiff; but he has no right to costs unless and until the court awards them to him, and the court has an absolute and unfettered discretion to award or not to award them. This discretion, like any other discretion, must of course be exercised judicially and the judge ought not to exercise it against the successful party except for some reason connected with the case. Thus, if – to put a hypothesis which in our courts would never in fact be realised – a judge were to refuse to give a party his costs on the ground of some misconduct wholly unconnected with the cause of action or of some prejudice due to his race or religion or (to quote a familiar illustration) to the colour of his hair, then a Court of Appeal might well feel itself compelled to intervene. But when a judge deliberately intending to exercise his discretionary powers has acted on facts connected with or leading up to the litigation which have been proved before him or which he has himself observed during the progress of the case, then it seems to me that a court of Appeal, although it may deem his reasons insufficient and may disagree with his conclusion, is prohibited by the statute from entertaining an appeal from it.”

In *Hong v. A. & R. Brown Ltd.* (11), Lord Greene, M.R. opened his judgment with the following words:

“This is an appeal on a matter of costs only. Such an appeal cannot be brought without the leave of the court or a judge by reason of the Supreme Court of Judicature (consolidation) Act, 1925, s. 31(1)(h), but that statement requires the qualification that, as costs are in the discretion of the judge, it is always possible to attack his order if can be shown that the discretion has never really been exercised. In that expression I would include two matters each of which nullifies the purported exercise of a judicial discretion. One matter is the failure to act as a judge should act, i.e., act judicially; the other is really a branch of the same thing, namely, to purport to exercise discretion without any materials on which discretion can be exercised.”

The words “act judicially” used by Lord Greene was commented upon and explained in *Baylis Baxter Ltd. v. Sabbath* (12). There Parker, L.J. said:

“For my part I think that, in referring to the word ‘judicially’ and in saying that the discretion must be exercised judicially, he is using that word in contradistinction to ‘arbitrarily’, in the sense of the illustrations given by Lord Cave in *Donald Campbell & Co. Ltd., v. Pollak* (9).”

Having regard to the above authorities it seems to me that where a discretion as to costs has been exercised by a judge his decision is unimpeachable unless he can be shown to have taken into consideration matters which are irrelevant to the issue in the case, or non-existent. Further an appeal will be entertained from the exercise of a discretion as to costs where the Court of Appeal is satisfied that the lower court applied a wrong principle of law: see *Bagwanji Raja v. Swaran Singh* (13), ([1962] E.A. 288 (C.A.) at p. 299).

The question that arises for our determination is:

“Was there any ground on which the learned resident magistrate could exercise his discretion in the way he did?”

In my opinion to disclose the death of the defendant described in the plaint is not sufficient reason for the exercise of resident magistrate’s discretion, and in applying the test in *Donald Campbell & Co. v. Pollak* (9), I am satisfied that the learned resident magistrate was wrong in the circumstances in depriving the appellants of their costs.

Whilst the appellant’s appeal against the resident magistrate’s ruling was pending in the Supreme Court the respondent filed an application for an order of security for costs. In his affidavit in reply to the affidavit accompanying the respondent’s notice of motion Mr. Kohli who it appears was no longer under any apprehension about the legal position put the facts in their proper perspective. The relevant paragraphs of his affidavit read as follows:

- “2. That the appellant (defendant) is not a dead person but a firm constituted of three partners M. H. Essa, E. H. Essa and H. H. Essa carrying on business under the firm name of Haji Essa Adam & Sons but the plaintiff (respondent) in the original suit erroneously described the firm as ‘Haji Essa Adam’ in place of ‘Haji Essa Adam & Sons’ but the defendant (appellant) did not take any technical objection to this error.
3. That the respondent (plaintiff) knew very well about the correct name of the appellants (defendants) which fact is apparent from the letter of demand dated 20th September, 1956, written by the then advocates of the respondent (plaintiff) Messrs. Jones & Jones, the copy of which letter is attached herewith and marked ‘A’ which said letter was replied in terms of letter of Messrs. Velji Devshi & Bakrania, the then advocates of the appellant (defendant) the copy of which letter is enclosed herewith and marked ‘B’.
4. That the respondent (plaintiff) and his advocates Mr. R. K. Sood knew that the defendants (partners) were carrying on business under the firm name which is apparent from the said letter of demand of Messrs. Jones & Jones and the admission of Mr. Sood “The defendant I have discovered just now died in 1941. Recent defendants are relations of the deceased and are trading under the deceased’s name.
5. That from para. 4 and 5 above it is quite clear that the appellant (defendant) is not a dead person but a firm of living partners.
6. That in response to the respondent’s advocate’s letter dated 8th July, 1959 was sent, a copy of which letter is attached herewith and marked ‘C’, wherein it was admitted that the appellant is a firm.
7. That I am informed by the appellants Messrs. Haji Essa Adam & Sons that they are responsible for the consequences of this appeal and this my statement be taken as an admission for the same and that I verily believe the said statement to be true.
8. Reasons Wherefore I pray that the respondent’s application for security for costs be disallowed with costs to the appellant in any event.”

In spite of this affidavit which, in my view, disclosed a very clear case of misnomer the learned judge of the Supreme Court made the following ruling:

“Haji Essa Adam & Sons not being before the court security for costs cannot be ordered against them.

Application dismissed.

Costs in cause.”

The order of the learned judge was attacked in this appeal on the ground that the application for security for costs should have been dismissed with costs to the second appellants and that the order for “Costs in cause” was contrary to s. 27 of the Civil Procedure Ordinance and wholly unjudicial.

The costs in an application for security for costs are in the entire discretion of the court and is not subject to any of the limitations prescribed by the rules.

The learned judge had before him all the facts in the affidavits used at the hearing of the motion, and in law he was wrong in the view he took of these facts. He therefore exercised his discretion on wrong grounds, and in my view the exercise of a discretion on wrong grounds cannot be judicial. I can see no misconduct on the part of the appellant which would be a good reason for depriving them of their costs on the dismissal of the application for security for costs. I am satisfied that the learned judge wrongly exercised his discretion on this matter and that this order as to cost must be set aside.

On the hearing of the substantive appeal against the resident magistrate’s order as to costs counsel for the appellants applied for an amendment of the plaint and defence by adding “and Sons” to the defendant’s name. The learned judge made no immediate ruling on this application, but he stopped counsel from further argument of the appeal. Then about three weeks later he delivered a judgment in which he made the following observations:

“It is not disputed that Haji Essa Adam died in 1941 and in his affidavit replying to the respondent’s application for security for costs Mr. Kohli recited that Haji Essa Adam ‘is not a dead person but a firm constituted of three partners, M. H. Essa, E. H. Essa and H. H. Essa, carrying on business under the firm name of Haji Essa Adam & Sons’. Haji Essa Adam & Sons being a partnership, and presumably registered under the Registration of business Names Ordinance, 1951, is a distinct person from Haji Essa Adam whether the latter is alive or dead and if he is dead then the only action that can be maintained on his behalf are such as are brought by his duly appointed executors or administrators suing or being sued as such.”

I have said enough already in this judgment to show that the case was one of misnomer and that the learned judge was wrong in regarding it as action against a dead man.

As to the application to amend the plaint the learned judge said as follows in his judgment:

“This of course, the court had no jurisdiction to do for Haji Essa Adam the named appellant is not before the court and is incapable of making any application.”

With all due respect to the learned judge I think he erred in refusing to amend the plaint on the ground that he lacked jurisdiction. In *Pearlman (Veneers) S.A. (Pty) Ltd. v. Bernhard Bartels* (14), it was held that a court had jurisdiction to correct a misnomer or misdescription at any time whether before or after judgment was given. There seems to me to be some similarity between that case and this present one. There the plaintiffs who had obtained judgment in the English courts against “*Bernhard Bartels*” for breaches of contracts, sought to enforce that judgment in Germany. The defendant contended that the judgment of the British court was a nullity and unenforceable because his forename was “Josef” and there was no such person as “Bernhard Bartels” in existence. The defendant had entered into the contract as Bernhard Bartels. The plaintiff’s application for leave to amend the title of their action to read “Josef Bartels trading as Bernhard Bartels” was granted. On appeal Denning, L.J. said ([1954] 1 W.L.R. at p. 1459):

“When the substantive judgment is not being altered, but only the title of the action, it is to my mind plain that this court has ample jurisdiction to correct any misnomer or misdescription at any time whether before or after judgment.”

The amendment in *Pearlman (Veneers) S.A. (Pty) v. Bernhard Bartels* (14) was made by virtue of the power contained in R.S.C., Order 28, r. 12, which is similar to Order VI, r. 18 of the Civil Procedure (Revised) Rules, 1948 of Kenya.

For the above reasons I am of the opinion that the order as to costs made on the application for order for security for costs and the judgment of the learned judge of the Supreme Court should both be set aside.

The learned judge failed to consider the case on the merit, but since the plaintiff discontinued the action in the resident magistrate’s court it is not necessary in my opinion to order a re-hearing.

I would allow the first appellant’s appeal without costs. I would also allow the second appellant’s costs (1) in the Supreme Court, (2) of their appeal to the Supreme Court and (3) of this appeal. In my view the second appellants are also entitled to costs in the suit.

Crawshaw JA: Crabbe, J.A. has set out fully the facts and the law involved in this appeal, and I do not propose to repeat them in any detail. I agree entirely with him that this is a clear case of misnomer, and that both parties knew that it was in fact the appellant firm, Haji Essa Adam & Sons, which the respondent was intending to sue and not the man Haji Essa Adam who had died some sixteen years earlier, but whose name appeared as the defendant in the title to the suit; if Mr. Sood, the Advocate who drew up the plaint and conducted the proceedings on behalf of the respondent, was at one time mistaken, the second appellants cannot be blamed for that.

On September 20, 1956, a letter was written by the lawyers for the respondent (not then Mr. Sood) demanding from “Haji Essa Adam & Sons” a sum of Shs. 460/-. A letter of October 2, 1956 in reply was written denying liability in the same firm name. After the suit had been set down for hearing the second appellants sent a telegram to the resident magistrate asking for an adjournment, also in the firm name. The letters were not before the magistrate at the time the suit came on for hearing on March 20, 1959; they were filed later that year by the second appellants on an application by the respondent for security for costs of an intended appeal by the second appellants. At the time of the hearing on March 20, the only indication on the record that the defendant was a firm was the affidavit of service, to which the attention of the magistrate was drawn by Mr. Kohli who appeared for the second appellants, and the telegram. Mr. Sood said:

“The defendant I have discovered just now died in 1941. Recent defendants are relatives of the deceased and are trading in the deceased’s name. Request permission to withdraw.”

It would seem therefore that from what was already on the record and from Mr. Sood’s reference to the so-called “recent defendants” trading in the deceased’s name and from Mr. Kohli’s reference to the “defendants” having been served, the magistrate must have understood that the second appellants were the real defendants in the suit. The wording of the magistrate’s ruling on March 24 really confirms this, as he refers to the defendants in the plural, and to what steps they should have taken. As the respondent was then asking to withdraw the suit instead of asking to have the misnomer corrected, I do not personally see why the second appellants should be held in any way to blame at that stage

for not seeking to keep it alive; it was not their suit. Mr. Gautama, for the respondent, has said that had the respondent asked for an amendment instead of asking for withdrawal he had no doubt that the magistrate would have permitted it, and I do not see how the magistrate could have done otherwise.

The fact that the second appellants might earlier have taken action to remedy the respondent's mistake, is not I think relevant when the respondent, knowing the true position, preferred to withdraw the suit to having the title put right and proceeding with it. Admittedly, Mr. Kohli is recorded as saying that the defendants "had answered for the dead man", and that the "plaintiff cannot go on" (he subsequently alleged that these were not correct recordings), but if any meaning is to be given to this it can only be, in the circumstances, that the suit could not proceed unless the defendant's firm name was substituted for that of the deceased.

I am of the opinion that the magistrate acted on a wrong principle in not awarding the costs to the second appellants. A successful litigant may be deprived of his costs in the discretion of the trial court if some grounds can be shown for so doing. The grounds must, however, be valid ones. Those given by the magistrate were that "the defendants should not have accepted service or should have set out in their defence that they were not the defendant." Without expressing a view on whether they should have done so, I would say that their failure to do so occasioned no expense, inconvenience or delay to the respondent up to the time of the latter's application to withdraw, when, as I have said, he could instead have proceeded with the action by an amendment of the title. Had he done so and the second appellants have obtained judgment, there could be no doubt that the costs would have been awarded to the second appellants without any deduction in respect of proceedings prior to the hearing of the action. Because the respondent preferred to withdraw rather than continue with the hearing, the second appellants should not be made to suffer. The reasons given by the magistrate for depriving the second appellants of their costs were not in my opinion ones on which he could validly exercise his discretion; he exercised it on wrong material.

The appellants appealed, still in the name of "Haji Essa Adam" against the magistrate's ruling as to costs. At the hearing of the appeal they asked for the title to be changed into their firm name (having previously unsuccessfully asked the approval of the respondent to this) but this was refused by the learned judge on the ground that he had no jurisdiction to do so," for Haji Essa Adam the named appellant is not before the court and is incapable of making any application". For the reasons given by my brother Crabbe and also by myself, I consider, with respect, that the learned judge was wrong. From what I have said, it also follows that I think he was wrong when he said "the magistrate was correct in the reasons given in his ruling, . . .".

For the reasons given by my brother Crabbe I agree the second appellants should have been awarded the costs of the unsuccessful application for security for costs, and that, whatever the result of the appeal by the second appellants' the appeal by Mr. Kohli should be allowed, although unfortunately for him, there is in my opinion no-one against whom his costs of this appeal can properly be made payable. Mr. Khanna, who appeared for both appellants submitted that the respondent should pay, though it was not part of the respondent's case that Mr. Kohli should be held personally liable, and in the absence of authority (we have been referred to none), I do not think that the respondent can be held responsible. I would like to say that in my view no unprofessional stigma attaches to Mr. Kohli in his conduct of the proceedings, and I understand Mr. Gautama too expressed a like view and did not support the order of the learned judge.

I have read the judgments of my brother judges and observe that on certain issues were are not unanimous. Taking the majority view, the orders of the court, will be as follows:

- (a) The appeal insofar as it complains that the second appellants should have been awarded costs by the magistrate on the withdrawal of the suit by the respondent, is allowed with costs.
- (b) The order of the Supreme Court that the costs of the application for security for costs should be costs in the cause is set aside, and there will be an order that the respondent pay the costs.
- (c) The order of the Supreme Court as to the costs of the appeal is set aside, and it is ordered that the respondent pay the costs of the second appellants. It follows that the appeal of the first appellant is allowed as to personal payment of costs, and it is further allowed by releasing him from his undertaking that he, or his firm, would repay any fees received from the second appellants. There will be no order for the costs of appeal of the first appellant.
- (d) The costs of the second appellants' appeal to this court will be paid by the respondent.
- (e) An order dismissing the appeal will be substituted for the order of the Supreme Court striking it out.

Newbold JA: In this appeal, which was brought by special leave of this court granted under s. 74 of the Civil Procedure Ordinance (Cap. 5, and hereinafter referred to as "the Ordinance") the first appellant is an advocate (hereinafter referred to as "the advocate") and the second appellant is described as "M. H. Essa, E. H. Essa and H. H. Essa trading as Haji Essa Adam & Sons" but sued under incorrect firm name or style of "Haji Essa Adam" (hereinafter referred to as "the firm"). The appeal arose out of a suit brought by the respondent (hereinafter referred to as "the plaintiff") against Haji Essa Adam (hereinafter referred to as "the defendant") in the resident magistrate's court Kisumu whereby the plaintiff claimed a sum of money for goods sold and delivered to the defendant in 1955 and it was alleged that full particulars thereof had been supplied to the defendant.

The facts relevant to the appeal are fully stated in the judgment of Crabbe, J.A. and I shall refer only to certain salient facts. In the suit the defendant's place of business was stated to be Narok and the plaint was forwarded to Narok where it was served upon Musa Haji Essa as a partner and manager of the firm. Notice that an appearance had been entered for the defendant was given to Mr. Sood, who was the advocate appearing for the plaintiff, and subsequently a defence was filed in the name of the defendant, which defence specifically admitted the names and description of the parties but denied the debt. When the case came on for hearing Mr. Sood made a submission that it was for the defence to begin and the resident magistrate ruled against him and called upon the plaintiff to prove his case. Mr. Sood thereupon stated that he had just discovered that the defendant had died in 1941 and that the "recent defendants" were relations of the deceased and traded under the deceased name; and he requested permission to discontinue stating that there was no disclosure in the pleadings of the events which had taken place. The advocate, who though on the record as appearing for the defendant appeared apparently for the firm, stated that that firm had answered for the dead man and that the firm had been served and was present to defend the suit; and, apparently, on Mr. Sood seeking leave to discontinue the advocate asked for his costs. The matter was adjourned for a ruling as to costs and a few days later the resident magistrate gave leave to discontinue and made no order for costs on the ground that the firm should

either not have accepted service or should have set out in the defence that it was not the defendant. It is to be noted that no application to amend the proceedings by substituting the name of the firm for that of the defendant was made by either party and there was no objection to the application to discontinue. It would seem that the sole dispute was whether the firm should be given costs.

As quite clearly if any goods were supplied in 1955 they must have been supplied to the firm and not to the defendant, I am satisfied that this was a simple case of misnomer (see *Davies v. Elsby Brothers Limited* (3)) and that, had either the plaintiff or the firm applied for an amendment of the name of the person against whom the suit was brought, the resident magistrate would and should have substituted the name of the firm. But, notwithstanding the powers given by Order 1, r. 10, I do not consider that it was proper, in the absence of any such application, for the resident magistrate to do so suo moto. The result was that the name of the defendant remained on the suit which by leave of the resident magistrate, and apparently without opposition, was discontinued. In those circumstances the only true issue on this appeal in so far as the firm is concerned is: was the firm entitled to costs either as of right or in the proper exercise of the discretion of the resident magistrate? Mr. Khanna, who appeared on the appeal for both appellants and who, quite unnecessarily and with remarkably little foundation, imputed professional misconduct against Mr. Sood, submitted that the firm was entitled to costs as of right by virtue of Order XXIV, r. 3, and in any event in the proper exercise of a discretion under s. 27 of the Ordinance. As the plaint had not been amended so as to make the firm a party to the suit I entertain the gravest doubts whether costs could be given to a person who was not a party to the suit: it seems to me that the most which could be done would be to order costs to the defendant (which would be a strange thing to do as he was known to be dead) and if at a later stage the plaint was amended substituting the name of the firm for the defendant, then, but not till then, the costs would go to the firm. In any event, however, I am satisfied that the firm was not entitled as of right to costs under Order XXIV, r. 3, as that rule did not apply and that in accordance with r. 1 of the same Order the award of costs was in the discretion of the resident magistrate. In my view the reasons given by the resident magistrate for making no order for costs were perfectly proper matters to be considered in deciding what order should be made as to costs on the facts of the particular case. As I have said, it would have been open to the resident magistrate, if application had been made, to substitute the name of the firm for that of the defendant but no such application was made. This appeal cannot be argued, as in effect Mr. Khanna has sought to argue it, on the basis that the resident magistrate had improperly refused to substitute the name of the firm for that of the defendant when no such application had ever been made. I consider that the acts of the advocate for the firm in entering an appearance and a defence in the name of the defendant, acts which on appeal to the Supreme Court and to this court were conceded to be to some extent blameworthy, were perfectly proper matters for consideration on the question of costs. In arriving at his decision on the question of costs the resident magistrate could only consider facts which were before him then, thus any further facts which subsequently came to light must be discarded in considering whether there is any ground for interfering on appeal with the exercise of the discretion of the resident magistrate.

From the decision that the suit should be discontinued and that there should be no order for costs, the firm, without having applied for an amendment of the name of the parties, and without having objected to the application to discontinue, chose to appeal on the grounds that the suit should have been dismissed with costs to the firm. The decision of the resident magistrate could, at that stage, have involved only a trifling sum; and everything which transpired

subsequently stems from an appeal which in my opinion should never have been brought. I should like to emphasise, as Mr. Gautama who appeared for the plaintiff on the appeal pointed out, that the question on the appeal to the Supreme Court and on the further appeal to us is simply and solely whether the order of the resident magistrate as to costs was correct; and as Mr. Gautama also pointed out an appeal to this court under ss. 72 and 73 of the Ordinance lies only on a question of law. For the reasons I have given I am satisfied that there is absolutely no reason to interfere with the decision of the resident magistrate.

As I have said, the appeal to the Supreme Court was brought in the name of the defendant, a man known to be dead. Without any application for amendment the plaintiff applied for security for costs. I do not think that the plaintiff should have done this; without an amendment it is not clear how either a dead man could give security or the firm, who was not a party, could be ordered to give security. The Supreme Court dismissed the application for these reasons and made an order that the costs should be costs in the cause. I think this order was wrong, and, as the firm had still not been made a party to the proceedings, that it would have been proper to make no order as to costs.

On the appeal before the Supreme Court being heard the firm applied to have its name substituted for the name of the defendant. The learned judge, in my view quite wrongly, refused the application, stopped the proceedings and struck out the appeal. Quite obviously this was a case of misnomer and it is clear that an amendment could be made at any stage (see *Mountain & Co. v. Rumere Limited* (5) and *Whittam v. Daniel & Co. Ltd.* (4)). The judge also made a order in relation to the advocate which I shall deal with later.

From that decision an appeal to this court was lodged and eventually, though precisely how does not appear from the record, the firm became a party to the proceedings. According to the prayer of the memorandum of appeal, the firm asks that:

“the judgment and decree of the two courts below be set aside, and the suit before the magistrate be dismissed, or ordered to be retried before another magistrate, and proper directions as to issues to be tried and evidence to be received, and points for determination be given.”

Precisely what that prayer involves is not clear to me but Mr. Khanna stated that the firm seeks orders of this court directing that the firm should have the costs before the resident magistrate, the costs of the security for costs application, the costs of the appeal to the Supreme Court and the costs of this appeal, including the application for special leave, but did not seek an order for re-hearing as he accepts what has been evident from the first, that is that the plaintiff had sought and obtained without objection the leave of the court to discontinue. In my view, for the reasons I have given, the firm is not entitled to the orders for costs which it seeks. The position prior to any order on this appeal, and the orders I would make on this appeal, are as follows:

- (1) In the resident magistrate's court there is no order for costs. I would not vary that decision.
- (2) On the security for costs application the costs were ordered to be costs in the cause. I would vary that order and substitute therefor a direction that there should be no order for costs.
- (3) On the appeal to the Supreme Court the firm was not ordered to pay or receive any costs. I would maintain this position. I would substitute an order dismissing the appeal for the order striking it out. So far as the judgment and decree orders the advocate to pay all the costs I shall deal with this later.

- (4) I would order the firm to pay to the plaintiff the costs of this appeal, which costs would include the costs on the application for special leave and all matters incidental to this appeal.

Turning now to the appeal of the advocate, I consider, that not only was the order that the advocate pay the costs personally quite wrong but that the procedure adopted by the learned judge was also quite wrong (see *Myers v. Elman* (1), and *Abraham v. Jutson* (2)). It is quite clear that the order that the advocate pay the costs of the proceedings personally cannot stand nor can the undertaking required of him and given to the judge that he would return any fee relating to this matter received by him or his firm from the firm and that he would not receive any fee relating to the matter from the firm. It was no part of the case of either the plaintiff or the firm that the advocate should pay the costs and I find great difficulty in ordering either or both of them to pay his costs. This is a case of an unfortunate advocate having to come to this court to put right an incorrect order made by a judge suo moto.

I would accordingly:

- (a) dismiss the appeal of the firm with costs, which costs would include the matters I have referred to above, but would vary the order of the Supreme Court in relation to the costs of the application for security for costs;
- (b) allow the appeal of the advocate, set aside the judgment and decree of the Supreme Court insofar as it ordered the advocate to pay the cost of the proceedings personally, and release him from the undertaking to which I have referred above but make no order for costs on his appeal.

Appeal of the first appellant allowed without costs. Judgment and orders of the Supreme Court set aside. Second appellants to be allowed costs in the magistrate's court, of their appeal to the Supreme Court and on dismissal of the respondent's application for security for costs, and of their appeal.

For the appellants:

D. N. and R. N. Khanna, Nairobi

D. N. Khanna

For the respondent:

Satish Gautama and R. K. Sood, Kisumu

Sunderdass Hariram v Bhupendra Shamjibhai
[1964] 1 EA 240 (CAN)

Division:	Court of Appeal at Nairobi
Date of judgment:	31 March 1964
Case Number:	9/1962
Before:	Sir Trevor Gould VP, Newbold and Crabbe JJA
Sourced by:	LawAfrica

[1] Privy Council – Kenya – Independence of Kenya – Appeal to Judicial Committee – Jurisdiction of Court of Appeal for Eastern Africa to grant leave after independence – Whether Privy Council can entertain appeals from Kenya.

Editor's Summary

The applicant applied for conditional leave to appeal to the Privy Council from a judgment of Her Majesty's Court of Appeal for Eastern Africa delivered on November 5, 1962. At the hearing of the application on March 11, 1964, it was submitted for the respondent that under the present constitution of Kenya, as set out in Schedule 2 of the Kenya Independence Order in Council 1963, which came into force on December 12, 1963, no appeal lay to the Privy Council. The application for conditional leave was lodged on December 8, 1962.

Held –

- (i) the jurisdiction exercised by Her Majesty's Court of Appeal for Eastern Africa under Orders in Council was determined (in relation to Kenya) as from December 9, 1962, and the court was then constituted by an Act of the East African Common Services Organisation entitled the "Court of Appeal for Eastern Africa Act, 1962";
- (ii) the Kenya Constitution (Amendment) Order in Council 1962, which came into force on December 9, 1962, provided for appeals from the reconstituted Court of Appeal to Her Majesty in Council;
- (iii) appeals to Her Majesty in Council were abolished by the Kenya Independence Order in Council 1963 but, by the Constitution set out in Schedule 2 to that Order, appeal to the Judicial Committee of the Privy Council is substituted and by s. 16 (1) of the Order in Council jurisdiction was given to the Court of Appeal to continue and conclude all proceedings pending immediately prior to the commencement of the Order in Council, provided an appeal to the Judicial Committee still lies.
- (iv) a right to appeal from the decisions of the Court of Appeal to the Judicial Committee of the Privy Council is conferred by s. 181 of the Constitution and s. 17 of the Kenya Independence Order in Council 1963 and, in the instant case, from Her Majesty's Court of Appeal for Eastern Africa by the combined effect of s. 1 (4) of the Kenya Order in Council 1963, s. 233 of the Constitution and s. 38 of the Interpretation Act, 1889.

Application for conditional leave to appeal allowed.

Judgment

Sir Trevor Gould VP, read the following judgment of the court: This is an application for conditional leave to appeal to the Privy Council from a judgment of this court on appeal from the Supreme Court of Kenya. Counsel are agreed that the amount in dispute is such as to entitle the applicant to such conditional leave as of right but it has been submitted that under the present constitution of Kenya, as set out in Schedule 2 to the Kenya Independence Order in Council, 1963 (hereinafter called "the Independence Order") no appeal lies to the Privy Council, and this question is now for decision.

For reasons which will appear it is necessary to look briefly at the history of the constitution of this court. So far as Kenya is concerned it was created

and operated for many years under a series of Orders in Council made by the English Sovereign from time to time on the advice of the Privy Council. Appeal lay from this court to Her Majesty in Council by special leave or under procedure regulated by Order in Council. There is no dispute about this and no need to go into further detail.

As from December 9, 1962, the jurisdiction exercised by this court under Orders in Council was determined (in relation to Kenya) and the court was constituted by an Act of the East African Common Services Organisation intituled the Court of Appeal for Eastern Africa Act, 1962. Also on December 9, 1962 the Kenya (Constitution) (Amendment) Order in Council, 1962 (hereinafter called "the 1962 Amendment Order") came into force amending the Kenya Constitution and Providing for appeals from the reconstituted court (hereinafter called "the Court of Appeal") to her Majesty in Council. Para. 5 (1) of that Order read:

- "5.(1) In respect of any decision of Her Majesty's Court of Appeal for Eastern Africa given in the exercise of any jurisdiction conferred upon it by any law in force in Kenya before the commencement of this Order, an appeal may be commenced, continued and concluded or continued and concluded, as the case may be, in accordance with the provisions of Part VIIB of the Kenya (Constitution) Order in Council 1958 (as inserted by s. 3 of this Order) as nearly as may be as if it were an appeal from a decision of the Court of Appeal for Eastern Africa."

Also coming into force on December 9, 1962, was the Kenya (Procedure in Appeals to Privy Council) Order, 1962 (hereinafter called "the Procedural Order 1962") under which the Court of Appeal acquired jurisdiction to deal with such applications as the present one. This Order in Council was not revoked (though it was amended in a way not now material) when Kenya attained to internal self government under the Kenya Order in Council, 1963. It was still in force immediately before the commencement of the Independence Order on December 12, 1963. That order contains the existing constitution and we set out ss. 4 (1) and 4 (8) thereof:

- "4(1) Subject to the provisions of this Order, the existing laws shall, notwithstanding the enactment of the Kenya Independence Act, 1963 and the revocation of the existing Orders, continue in force after the commencement of this Order as if they had been made in pursuance of this Order, but they shall be construed with such modifications, adaptations, qualifications and exceptions as may be necessary to bring them into conformity with this Order.
- 4(8) For the purposes of this section, the expression 'existing law' means any Ordinance, Enactment, law, rule, regulation, order or other instrument made or having effect as if it had been made in pursuance of the existing Orders and having effect as part of the law of Kenya or of any part thereof immediately before the commencement of this Order or any Act of the Parliament of the United Kingdom or Order of Her Majesty in Council (other than the Kenya Independence Act, 1963 and this Order) so having effect."

The Procedural Order, 1962, to which reference has been made, is clearly an existing law as defined in sub-s. (8) for it was an Order of Her Majesty in Council having effect as part of the law of Kenya immediately before the commencement of the Independence Order. It therefore continues in force under s. 4 (1) and while by the Independence Order appeals to Her Majesty in Council are abolished (subject to transitional provisions) and appeal to the Judicial Committee of the Privy Council is substituted by the Constitution, s. 4 (1) of

the Order provides that the existing laws shall be construed with such modifications, adaptations, qualifications and exceptions as may be necessary to bring them into conformity with the Order. Read with s. 17 (2) which is reproduced below, that is probably sufficient in itself but there is also the combined effect of s. 183 (2) of the Constitution and s. 4 (3) of the Independence Order. These read:

- “183 (2) Subject to the provisions of this chapter, provision may be made by or under an Act of Parliament regulating the procedure to be adopted by any court established for Kenya with respect to any appeal to the Judicial Committee under this Chapter or by the parties to any such appeal.
- 4 (3) Where any matter that falls to be prescribed or otherwise provided for under the Constitution by Parliament or by a Regional Assembly or by any other authority or person is prescribed or provided for by or under an existing law (including any amendment to any such law made under this section) or is otherwise prescribed or provided for immediately before the commencement of this Order by or under the existing Orders, that prescription or provision shall, as from the commencement of this Order, have effect as if it had been made under the Constitution by Parliament or by the Regional Assembly or, as the case may be, by the other authority or person.”

There is also specific provision in section 16 (1) of the Independence Order of which I reproduce only the relevant words:

- “16(1) All proceedings that, immediately before the commencement of this Order, are pending . . . before the Court of Appeal for Eastern Africa may be continued and concluded after the commencement of this Order . . . before the Court of Appeal for Eastern Africa”.

We consider that those provisions put beyond doubt our jurisdiction to continue the hearing of the application and grant the order asked for provided an appeal does lie to the Judicial Committee of the Privy Council.

The provision for appeals to the Judicial Committee of the Privy Council (so far as relevant) is in s. 181 (1) of the Constitution which reads:

- “181 (1) Subject to the provisions of ss. 50 (5), 61 (7), 101 (5) and 210 (5) of this Constitution and of sub-s. (4) of this section, an appeal shall lie as of right to the Judicial Committee from any decision given by the Court of Appeal for Kenya or the Supreme Court in any of the cases to which this subsection applies or from any decision given in any such case by the Court of Appeal for Eastern Africa or any other court in the exercise of any jurisdiction conferred under s. 176 of this Constitution.”

In s. 247 (1) “the Judicial Committee” is defined as the Judicial Committee of the Privy Council established by the Judicial Committee Act, 1833 (as from time to time amended). The argument relates to the reference in s. 181 (1) to s. 176 of the Constitution, which provides, in effect, that the Court of Appeal shall have jurisdiction “if Parliament so provides”. Parliament has made no such provision and, it is said, the appeal to the Judicial Committee does not lie because the Court of Appeal was not exercising jurisdiction conferred by s. 176. That overlooks the provisions of s. 17 (2) of the Independence Order, from which I extract the relevant words as follows:

- “17(2) . . . the provisions of the Constitution and of any other law that regulate appeals to the Judicial Committee shall apply in relation . . . to decisions given by the existing Court of Appeal for Eastern Africa as they apply in relation . . . to decisions given by the Court of Appeal for Eastern Africa in exercise of any jurisdiction conferred on it under the Constitution; and

appeals to the Judicial Committee from decisions given . . . by the existing Court of Appeal for Eastern Africa may be prosecuted and disposed of accordingly.”

For completeness, the relevant portion of s. 17 (6) reads:

“In this section ‘the existing Court of Appeal for Eastern Africa’ means the Court of Appeal for Eastern Africa exercising any jurisdiction conferred on it under the existing Orders, or having effect as if it had been so conferred on it.”

The Court of Appeal exercises jurisdiction in Kenya under the Appellate Jurisdiction Ordinance, 1962, which came into force on December 17, 1962. That Ordinance was not made under the “existing Orders” which are indicated in para. 2 of the Independence Order as being The Kenya Order in Council 1963 and the Kenya (Amendment) Order in Council 1963: but by s. 4 (1) of the Kenya Order in Council 1963, the then existing laws (of which, by nature of the definition in s. 4 (5) the Appellate Jurisdiction Ordinance, 1962, was one) had effect “as if they had been made in pursuance of this Order”. The Ordinance therefore had effect as if made under the existing Orders for the purpose of s. 17 (6) of the Constitution. In view of these provisions it is clear, in our opinion, that a right of appeal to the Judicial Committee lies from the decisions of the Court of Appeal. That applies in relation to decisions taken after, as well as before, December 12, 1963, for the Appellate Jurisdiction Ordinance, 1962, is within the definition of “existing law” in s. 4 (8) of the Independence Order and is continued in force by s. 4 (1).

So much for the general law but a new consideration arises when the present application is considered in detail. Neither counsel drew our attention to the fact that the decision from which leave to appeal is being sought was given on November 5, 1962; that is, it was a decision not of the Court of Appeal but of Her Majesty’s Court of Appeal for Eastern Africa constituted under the old Orders in Council. The application for conditional leave was lodged on December 8, 1962, the day before the change in the court’s constitution became effective.

We have set out above s. 5 (1) of the 1962 Amendment Order, under which the appeal, commenced by the application, could be continued and concluded as if it were an appeal from the Court of Appeal. That placed the matter on a proper footing but for some reason the hearing of the application was unduly delayed and in April, 1963, the Kenya Order in Council 1963, came into effect, and, among the existing Orders, it revoked the 1962 Amendment Order. It did not survive as an “existing law” for it was itself an existing Order and not a law made pursuant to existing Orders (s. 4 (5)).

Upon consideration we do not think that the revocation referred to affects the position. The combined effect of s. 1 (4) of the Kenya Order in Council, 1963 and s. 233 of the Constitution in Schedule 2 thereof, is that the English Interpretation Act, 1889, applies to the interpretation of both Order and Schedule. Section 38(2)(c) of the Act of 1889 reads:

“38(2) Where this Act or any Act passed after the commencement of this Act repeals any other enactments, then, unless the contrary intention appears, the repeal shall not –

...

- (c) affect any right, privilege, obligation, or liability acquired, accrued, or incurred under any enactment so repealed;”

Under s. 5(1) of the 1962 Amendment Order the applicant acquired a right to have his appeal continued and concluded as if it were an appeal from a decision of the Court of Appeal. In our opinion that right survived the revocation

of the Order by virtue of the Interpretation Act, and still falls to be considered as such an appeal for the purpose of s. 17 (2) of the Independence Order.

The application is allowed in terms of the draft order filed; the amount of security for the purposes of para. 1 thereof is fixed at Shs. 10,000/-.

Application for conditional leave to Appeal allowed.

For the applicant:

G. S. Vohra, Nairobi

For the respondent:

S. C. Guatama, Nairobi

Momin Corporation (U) Ltd v Shaukatali H Jiwani
[1964] 1 EA 244 (HCU)

Division:	High Court of Uganda at Kampala
Date of judgment:	15 April 1964
Case Number:	49/1964
Before:	Sheridan J
Sourced by:	LawAfrica

[1] Practice – Summary procedure – Claim for vacant possession and mesne profits – Whether plaintiff entitled to invoke summary procedure.

Editor's Summary

The plaintiffs filed a plaint specially endorsed for summary procedure under O. 33 of the Civil Procedure Rules claiming vacant possession of premises and mesne profits at a monthly rate of Shs. 400/-. The defendant applied for leave to appear and defend under O. 33, r. 4 and submitted that institution of the suit under summary procedure was bad in law.

Held –

- (i) paragraph (e) of O. 33, r. 2 should have been and was intended to be a separate provision for summary procedure for the recovery of land with or without a claim for rent or mesne profits without the overriding requirement that a plaintiff should only seek to recover a debt or liquidated amount;
- (ii) the plaintiffs were entitled to bring the suit for the recovery of land with mesne profits under O. 33.

Application dismissed.

Cases referred to in judgment:

- (1) *S. C. Vaz v. Lazzaro Donini*, Uganda High Court Civil Case No. 507 of 1963 (unreported).
- (2) *Budai Coffee Hulling Factory Ltd. v. Eria M. Babumba*, [1963] E.A. 613 (U.).
- (3) *Uganda Transport Co. Ltd. v. Count de la Pasture* (1954), 21 E.A.C.A. 163.

Judgment

Sheridan J: This is an application under the Civil Procedure Rules, O. 33, r. 4 for leave to appear and defend.

By a specially endorsed plaint under the summary procedure (O. 33) the respondents/plaintiffs claim an order for possession of premises which they had let to the applicant/defendant and which they had determined by notice to quit. They also claim mesne profits at a monthly rate of Shs. 400/-.

In para. 3 of the affidavit in support of the application the applicant does not admit that the respondents have lawfully determined the tenancy in the manner set out in the plaint or at all. A copy of the notice to quit is annexed to the

plaint and on the face of it it is in order. Paragraph 3 does not state why the tenancy was not lawfully determined, as it should have done. The applicant has failed to raise a triable issue on this point.

Paragraph 4 of the affidavit gives rise to a more substantial and difficult matter. It avers that the institution of the suit under summary procedure is bad in law. Counsel for the applicant, relying on *S. C. Vaz v. Lazzaro Donini* (1) makes this application in order to get the matter before the court. In that case it was sought to strike out a plaint under O. 6, r. 17 or O. 7, r. 11 in a suit brought under O. 33, and it was held that the application was misconceived as the first essential step was to make an application under O. 33, r. 4.

The relevant provisions of O. 33 for the purpose of this application are:

- “2. All suits where the plaintiff seeks only to recover a debt or liquidated demand in money payable by the defendant, with or without interest, arising
- (a) . . .
 - (b) . . .
 - (c) . . .
 - (d) . . .
 - (e) in actions for the recovery of land, with or without a claim for rent or mesne profits, by a landlord against a tenant whose term has expired or has been duly determined by notice to quit, or has become liable to forfeiture for non-payment of rent, or against persons claiming under such tenant; or
 - (f) upon a Crown debt for income tax; may, at the option of the plaintiff, be instituted by presenting a plaint in the form prescribed endorsed ‘Summary Procedure Order XXXIII’, and accompanied by an affidavit made by the plaintiff, or by any other person who can swear positively to the facts, verifying the cause of action, and the amount claimed (if any), and stating that in his belief there is no defence to the suit.”

I find this a puzzling provision. I agree, following *Budai Coffee Hulling Factory Ltd. v. Eria M. Babumba* (2) (U.) that the governing words in O. 33, r. 2 are “seeks only to recover a debt or liquidated amount . . . arising in actions for the recovery of land”; but it goes on to say “with or without a claim for rent or mesne profits”. Now, what other liquidated amount would a plaintiff claim in actions for recovery of land besides rent or mesne profits? I can’t think of any obvious claim. Then there are the words “and the amount claimed (if any)” towards the end of r. 2 which seem to envisage a judgment other than for a liquidated amount. Further, in the second paragraph of r. 3 there is provision for a decree for the recovery of land (with or without mesne profits). I should point out that this provision was not brought to the notice of the court in the *Budai* case (2) (supra).

No assistance is to be derived from the Indian O. 37 which merely provides for the institution of summary suits upon bills of exchange, hundis or promissory notes which is covered by the Uganda O. 33, r. 2 (a). Also in the United Kingdom under the Rules of the Supreme Court (Revision) 1962, O. 14, r. 2 (The Annual Practise 1964, Vol. I, p. 181) an application for summary judgment can now be made in every action begun by writ other than one which includes:

- (a) a claim by the plaintiff for libel, slander, malicious prosecution, false imprisonment, seduction or breach of promise of marriage,
- or
- (b) a claim by the plaintiff based on an allegation of fraud.

This would, of course, be an action for the recovery of land.

In *Uganda Transport Co. Ltd. v. Count de la Pasture* (3) there was no claim for recovery of land but in his judgment (21 E.A.C.A. at p. 165) Briggs, J.A., said:

“The Uganda rule allows summary procedure only for recovery of land by a landlord or for recovery of a ‘debt or liquidated demand in money payable by the defendant, with or without interest’ or in certain other specified ways.”

While this was obiter and one does not know the reasons which led the learned justice of appeal to this conclusion, it does at least make sense of the seemingly contradictory provisions to which I have already referred. My own view is that it is a case of faulty drafting. Paragraph (e) of r. 2, O. 33, should have been and was intended to be a separate provision for summary procedure for the recovery of land with or without a claim for rent or mesne profits without the overriding requirement that the plaintiff was seeking only to recover a debt or liquidated amount. I think this is a case where the rules of grammar must yield to those of common sense: Maxwell on Interpretation of Statutes (9th Edn.) 236.

Accordingly I find that the respondent was entitled to bring this suit for the recovery of land with mesne profits under O. 33 and I dismiss the application for leave to appear and defend with costs.

Application dismissed.

For the plaintiff:

Ishani & Ishani, Kampala

M. Ishani

For the defendant:

Manubhai Patel & Son, Kampala

M. C. Patel

Bishan Das Shahi v I Girdharilal Sethi and another
[1964] 1 EA 246 (SCK)

Division:	Supreme Court of Kenya at Nairobi
Date of judgment:	9 December 1963
Case Number:	1056/1953
Before:	Rudd J
Sourced by:	LawAfrica

[1] *Arbitration – Award – Interest – Arbitration under order of court – Application for judgment in terms of award – Interest claimed from date of award – No provision for interest in award – Discretion of court to award interest.*

Editor's Summary

Following an arbitration under an order of the court the applicant applied for judgment in terms of the award and claimed interest on the amount awarded from the date of the award. For the respondents it was submitted that under O. 45, r. 16 (1) of the Civil Procedure (Revised) Rules, 1948, the judgment should be in terms of the award and as the award did not provide for interest the applicants were not entitled to any interest. For the applicant it was argued that under s. 26 of the Civil Procedure Ordinance (Cap. 5) the court had a discretion to award interest from the date of the award.

Held –

- (i) section 26 of the Civil Procedure Ordinance is wide enough to empower the court to order interest, but whether it should do so depends on the circumstances;

- (ii) in the circumstances the applicant was entitled to interest on the balance owing at 6 per cent. per annum.

Order accordingly.

Judgment

Rudd J: This is a motion for judgment in terms of an arbitration award. The incidental points are unusual and so I propose to set out the history of the matter in some detail.

The proceedings originally arose by way of ordinary suit by the applicant against the respondents and then the matters in question were by consent referred to arbitration under the order of the court. Each side appointed one arbitrator and the arbitrators filed an award dated Sept. 20, 1957, where Shs. 42,250/- was awarded to the plaintiff in full settlement.

When the award was made the plaintiff gave a written authority to receive payment of the amount awarded to him under the award to Mulji Jetha Ltd. and then a representative of that company made an agreement with the first respondent whereby this amount was to be paid by three cheques as follows:

Cheque dated December 31, 1957, for Shs. 14,000/-

Cheque dated January 31, 1958, for Shs. 14,000/-, and

Cheque dated February 28, 1958, for Shs. 14,250/-.

These cheques were handed over but later it was agreed that a cheque for Shs. 5,000/- and a cheque for Shs. 9,000/- should be given in place of the first cheque for Shs. 14,000/-. The cheque for Shs. 5,000/- was duly paid but all the other cheques were stopped because they were given on condition that the matter be marked settled and that receipts be passed. These conditions were not fulfilled and so the other cheques were stopped. This constituted a repudiation of the agreement for payment by the aforesaid cheques. Then the applicant moved for judgment in terms of the award and the respondents opposed the motion on the ground that Mulji Jetha Ltd. claimed to be assignees for the amount due under the award and that company had actually sued the respondents in respect of the cheque for Shs. 9,000/-. The motion was stood over. Mulji Jetha Ltd.'s suit for Shs. 9,000/- was ultimately dismissed on the ground that it was given subject to a condition which had not been fulfilled, but there still remained the issue as to whether there had been a valid assignment of the amount due under the award to Mulji Jetha Ltd. That issue was ordered to be tried and it was ultimately decided on October 25, 1963, that there was no valid assignment. Then the applicant brought in his original motion for judgment which had been made on April 9, 1958, and which came to hearing on April 30, 1958, and was adjourned or stayed pending determination of the issues which had been raised by the respondents.

This is the history of the main events but it should be stated that Mulji Jetha Ltd. made an application to be substituted for the plaintiff on the basis of the assignment which they alleged. That application failed when it was decided that there was no valid assignment.

In these circumstances the applicant now asks for judgment in terms of the award with interest from the date of the award. The respondents do not deny that the applicant is entitled to judgment in terms of the award subject to credit being given for the Shs. 5,000/- which was paid to Mulji Jetha Ltd. They object to interest other than the usual interest which would follow automatically on the decree pursuant to the judgment. They also ask for an order for payment by instalments and made submissions as to costs.

On the point of interest the respondents rely on O. 45, r. 16 (1) of the Civil Procedure (Revised) Rules, 1948, whereby the judgment is to be in terms of the award and the award does not provide for interest before judgment or from the date of the award. The applicant on the other hand submits that under s. 26 of the Civil Procedure Ordinance the court has a discretion to award interest from the date of the award.

In my opinion s. 26 is wide enough to empower the court to order interest but whether it should do so or not depends on the circumstances.

When the award was made it was no doubt envisaged that payment would be made in a reasonable time and that if it was not paid quickly there would be judgment in terms of the award and a decree within a relatively short time. There was no provision for deferred payment in the award and the amount was payable in effect upon demand. Further on the merits there is no doubt but that if the applicant did not assign the benefit of the award he did at least authorise payment to Mulji Jetha Ltd. and that authority was not revoked. It did not bind the respondents to pay Mulji Jetha Ltd. but if they had paid them they would have been entitled to an effective discharge. Further if they did not pay Mulji Jetha Ltd., they should have paid the plaintiff but they paid no one. I feel quite sure that if the respondents had put up the money they would have got a discharge and the whole matter could have been settled. They could have paid it into court and left the plaintiff and Mulji Jetha Ltd. to fight the matter out amongst themselves, but they did not do that. They questioned the plaintiff's right and now it turns out that the plaintiff was entitled to judgment in terms of the award. If the respondents had submitted to judgment on April 30, 1958, there would have been judgment and decree and the decree would carry interest at 6 per cent. I think the applicant should have interest on the amount outstanding at 6 per cent. from April 30, 1958. The amount outstanding is Shs. 3,725/-. There will, therefore, be judgment in terms of the award less Shs. 5,000/- paid since the date of the award and the decree will provide for interest at 6 per cent. from April 30, 1958, until payment.

I refuse the respondent's application for an order for payment by instalments.

I understand that the respondents have certain orders for costs against the applicants which have not been paid. In so far as these orders may be orders made in this suit, the amount of costs can be set off against the decree. In so far as the orders are made in other matters, I do not order such a set off and leave it for settlement between the parties and their advocates. The plaintiffs will have the costs of the original motion up to and including the costs of April 20, 1958, the costs for reinstating that motion and the costs of the hearing before me and the appearance for judgment. There will be interest on those costs less any set off under this judgment at 6 per cent. per annum as from the date of the decree.

Order accordingly

For the applicant:

D. V. Kapila, Nairobi

For the respondents:

Satish Gautama, Nairobi

Ed Kressmann & Co v L N Lakhani Ltd and another

[1964] 1 EA 249 (SCK)

Division: Supreme Court of Kenya at Nairobi
Date of judgment: 16 January 1964
Case Number: 1773/1961
Before: Farrell J
Sourced by: LawAfrica

[1] Sale of goods – Passing of property – Goods delivered and in bonded warehouse – Purchase price unpaid – Agreement to return goods to vendor – Confirmation by warehouseman that goods held for vendor – Attachment – Whether property in goods passed to vendor – Sale of Goods Ordinance (Cap. 31), s. 30 (3) (K.).

[2] Chattels transfer – Sale of goods – Goods delivered and in bonded warehouse – Purchase price unpaid – Agreement to return goods to vendor – Confirmation by warehouseman that goods held for vendor – Confirmation by letter to vendor’s agent – Attachment of goods – Whether letter “an instrument” within Chattels Transfer Ordinance (Cap. 28) (K.).

Editor’s Summary

In 1960 the second defendant purchased 176 cases of wine from the plaintiffs, a firm at Bordeaux, and the consignment when it arrived in Kenya was placed in a bonded warehouse. From time to time the second defendant having paid duty and warehousing charges withdrew from bond parcels of the consignment and at the beginning of May 1961, there remained in the bonded warehouse 120 cases. In payment of the price the second defendant had drawn a bill in favour of the plaintiffs but the bill was dishonoured and as a result of negotiations he agreed to return the 120 cases to the plaintiffs and on May 1, instructed the owners of the warehouse in writing to return the cases to the plaintiff. On May 8, 1961, the owners of the warehouse confirmed to the plaintiffs’ agent receipt of these instructions. Meanwhile on February 7, 1961, the first defendant obtained a decree against the second defendant and on June 14, 1961, obtained an order of attachment of the cases of wine. The plaintiffs objected to the attachment and objection proceedings were instituted in which they claimed that they were entitled to 120 cases of wines on the grounds that the transaction amounted to rescission of the original agreement of sale by the plaintiffs to the second defendant; or alternatively that there was an agreement of resale by second defendant to plaintiffs, and that the agreement was completed by delivery to the plaintiffs in accordance with s. 30 (3) of the Sale of Goods Ordinance (Cap. 31). For the first defendant it was submitted inter alia that the letter of May 1, 1961, was ineffective to pass any property or interest in the cases of wine to the plaintiffs; alternatively, that if it did so, it was an instrument within the meaning of the Chattels Transfer Ordinance (Cap. 28) and being unregistered was void against the first defendant by virtue of s. 13 of the Ordinance.

Held –

- (i) there was neither rescission of the original contract, which had been completely executed on the part of the plaintiffs, nor there was any revival of an expired unpaid seller’s lien on the cases of wine, but there was an agreement of resale by the second defendant to the plaintiffs;

- (ii) the letter of May 1, 1961, addressed to the owners of the warehouse was no more than a delivery order, taking effect under s. 30 (3) of the Sales of Goods Ordinance, whereby not title but possession in the goods is passed;
- (iii) the definition of “instrument” in the Chattels Transfer Ordinance does not mention a document transferring the possession of chattels but only mentions the transfer of the right of possession and there is nothing in the wording of the definition which makes it applicable to a transaction whereby possession

is in fact given to the grantee; and in this respect the scope of the Chattels Transfer Ordinance is no wider than the scope of the English Bills of Sale Acts;

- (iv) the letter of May 1, 1961, was not an instrument within the Chattels Transfer Ordinance and the property in the wine passed to the plaintiffs by an agreement of resale towards the end of April, 1961;
- (v) at the date of the order for attachment, namely, June 14, 1961, the property in the wine was no longer in the second defendant and he had no apparent possession by reason of which the wine must be deemed to continue in his possession at that date.

Order that the attachment order be discharged.

Cases referred to in judgment:

- (1) *Grigg v. National Guardian Assurance Co.* (1891), 3 Ch. 206.
- (2) *Charlesworth v. Mills*, [1892] A.C. 231.
- (3) *Johnson v. Diprose*, [1893] 1 Q.B. 512.
- (4) *Re Hall, ex parte Close* (1884), 14 Q.B.D. 386.
- (5) *Re Wood, ex parte Lewsham* (1879), 40 L.T. 104.
- (6) *Ancona v. Rogers* (1876), 1 Ex. Div. 285.
- (7) *Gough v. Everard* (1863), 159 E.R. 1.

Judgment

Farrell J: In these objection proceedings the plaintiff company claims to be entitled to 120 cases of French wines which the first defendant seeks to attach in execution of a judgment obtained against the second defendant in Civil case No. 12816/60 in the court of the resident magistrate, Nairobi.

The second defendant (to whom I shall refer as “Pichot”) was the proprietor of a club in Nairobi known as Maxim’s Club, and in the year 1960 purchased 176 cases of wine from the plaintiffs, a company carrying on business in Bordeaux. The consignment was imported through the agency of the Express Transport Co. Ltd. (to which I shall refer as “Express Transport”) and placed by the latter in their bonded warehouse in Nairobi. From time to time Pichot withdrew parcels of the consignment on payment of warehousing charges and customs duty. At the beginning of May, 1961, there remained 120 cases which are the subject of these proceedings.

By way of payment Pichot drew a bill for £1,466 19s. 0d. in favour of the plaintiffs, but the bill was not met. In April, 1961, the French Commercial Counsellor in Nairobi, acting as agent for the plaintiffs, entered into negotiations with Pichot and as a result Pichot wrote a letter to Express Transport on May 1, 1961, as follows:

“re: 129 cases of wine still in Bond

“Following some instructions which I have just received from Mr. Jacques Rimey, the French Commercial Counsellor, acting on behalf of the Ets. Kressmann-Ambassades in Bordeaux (France), I authorize you to return to the above mentioned firm all the 129 cases of wine which are in Bond storage in Nairobi.

It has been agreed between us that all the expenses as bond storage, transport to Mombasa, fret, insurance, rail transport or fret to Bordeaux etc., will be paid to you by the Ets. Kressmann-Ambassades C.O.D. I shall be most grateful to you if you could ask the French Commercial Counsellor to give you a complete discharge in writing to that effect.”

A copy of this letter was sent to the French Commercial Counsellor. Some further correspondence ensued between the latter and Express Transport, and on May 8, 1961, Express Transport wrote to the French Commercial Counsellor, confirming the instructions which they had received.

The first defendant (to whom I shall refer simply as the defendant) in the meantime had obtained a decree against Pichot on February 7, 1961, in the magistrate's court, and on February 27, obtained an order of attachment against the debtor's property lying at the club premises. The goods originally ordered to be attached did not include the cases of wine lying in the warehouse of Express Transport, and on June 14, 1961, at the request of the defendant an amended order of attachment was issued which included the cases of wine. The plaintiff objected to the attachment and these proceedings were in due course instituted.

For the plaintiffs it is submitted that there was a verbal agreement between themselves and Pichot to return the goods to the plaintiffs and that the letter of May 1, 1961, from Pichot to Express Transport was merely a delivery order for the purpose of carrying out the transaction already agreed upon. It was not essential to the title of the grantee as against the grantor, as that title had already been completed by the verbal agreement. In support of this proposition counsel for the plaintiff relies on the case of *Grigg v. National Guardian Assurance Co.* (1) (to which I shall refer later). For the defendant it is submitted, first of all, that the letter of May 1, 1961, was ineffective to pass any property or interest in the goods to the plaintiffs, alternatively, that if it did so, it is an instrument within the meaning of the Chattels Transfer Ordinance (Cap. 28 of the Revised Laws, 1962), and being unregistered is void against the defendant by virtue of s. 13 of the Ordinance, and in any case is void under s. 15 of the Ordinance owing to the absence of attestation.

Before deciding whether the letter is an instrument under the Ordinance, it is necessary first to consider exactly what was the nature of the transaction between Pichot and the plaintiffs. The evidence of the French Commercial Counsellor is that he personally went to see Pichot on April 29 or 30, acting on behalf of the plaintiffs. Pichot was asked to agree to return the wines to the plaintiffs and to give instructions to Express Transport to ship the wines back. He agreed to do so as he had no money to pay for them. As a result, Pichot wrote and signed the letter of May 1, 1961.

For the plaintiffs it is submitted first that the transaction amounted to a rescission of the original agreement of sale by the plaintiffs to Pichot; alternatively (if I understand counsel aright) that there was an agreement of resale by Pichot to the plaintiffs, and that the bargain was completed by delivery to the plaintiffs in accordance with s. 30 (3) of the Sale of Goods Ordinance (Cap. 31) which reads as follows:

"When the goods at the time of sale are in the possession of a third person, there is no delivery by seller to buyer unless and until such third person acknowledges to the buyer that he holds the goods on his behalf."

It is further submitted that the plaintiffs had an unpaid seller's lien on the goods, which admittedly had been lost when they parted with possession of them, but revived when they regained possession through their agent, the French Commercial Counsellor.

I do not think there was here any rescission of the original contract, which had been completely executed on the part of the plaintiffs, nor does it appear to me that there was any revival of an expired lien. I am satisfied, however, that there was an agreement of resale by Pichot to the plaintiffs. That there was some agreement is clear from the contradicted evidence of M. Massias, and it is

inconceivable that the letter should have been written unless there had been a pre-existing agreement. The evidence and the terms of the letter itself indicate that the agreement on the part of Pichot was to return the goods to the plaintiffs and it may be inferred that the consideration was the release of Pichot from the obligation to pay for the goods which were returned.

I turn now to the question whether the letter was an instrument as defined in the Chattels Transfer Ordinance. The Ordinance is based to a considerable extent on the English Bills of Sale Acts, though it differs from them in wording and arrangement and in many of its provisions, and it will be convenient first of all to consider the question in the light of the English law and authorities, and then to see whether any conclusions arrived at on the basis of the English law remain valid under the differing provisions of the Ordinance.

The English Acts make a clear distinction between absolute bills of sale, and bills of sale by way of security. The latter are the subject of the amending Act of 1882, but absolute bills of sale are still governed by the principal Act of 1878. In this case no question of security arises, and the matter, if it arose under English law, would be governed by the Act of 1878. The purpose of the legislation has been described by Lord Halsbury, L.C., *Charlesworth v. Mills* (2) in the following passage (1892) A.C. at p. 235):

“That the Bills of Sale Acts of 1854 and 1878 were intended to prevent false credit being given to people who had been allowed to remain in possession of goods which apparently were theirs, the ownership however of which they had parted with, is manifest enough by the language of those statutes. The Acts intended, in a case with creditors, that if people were allowed to remain in possession of goods, of which nevertheless the ownership was no longer theirs, those goods and chattels should be subject to the execution of bona fide creditors who ought not to have been induced to give credit by the apparent ownership of the goods being in those persons, and who were therefore entitled to have their debts satisfied when by the default of the assignees of those goods they had been allowed to continue in possession of persons to whom the property in them no longer belonged. That was the intended policy; and for such purposes it is manifest that the Legislature would desire to give the widest possible interpretation to every one of the documents by which the ownership was really intended to be practically changed, while the goods still remained in the apparent possession and dominion of the persons from whom the ownership had nevertheless really passed away.”

The definition of “bill of sale” is contained in s. 4 of the 1878 Act as follows:

“The expression ‘bill of sale’ shall include bills of sale, assignments, transfers, declarations of trust without transfer, inventories of goods with receipt thereto attached, or receipts for purchase moneys of goods, and other assurances of personal chattels, and also powers of attorney, authorities, or licenses to take possession of personal chattels as security for any debt, and also any agreement, whether intended or not to be followed by the execution of any other instrument, by which a right in equity to any personal chattels, or to any charge or security thereon, shall be conferred . . .”

There follow a number of exceptions which at this stage, at any rate, are not material.

The above definition is to be read subject to the previous section under, which the Act is expressed to apply to “any bill of sale . . . whereby the holder or grantee has power, either with or without notice, and either immediately or at any future time, to seize or take possession of any personal chattels

comprised in or made subject to such bill of sale.” In accordance with this limitation, and with the statement of Lord Halsbury above cited, it has been held by Lord Esher, M.R., in *Johnson v. Diprose* (3) ((1893) 1 Q.B. at p. 515), as in a number of other cases, that a bill of sale is “a document given with respect to the transfer of chattels used in cases where possession is not intended to be given.”

In *Re Hall, ex parte Close* (4) a trader, whose banking account was largely overdrawn, and who required a further advance of £500, deposited with his bank the invoice of goods bought by him on credit and consigned to him by rail, and gave the bank a delivery order directed to the railway company requiring the company to hold the goods to the order of the bank. The invoice showed that the goods were bought on credit. On arrival of the goods the company sent the usual advice note to the bank stating that they held the goods to the order of the bank. The £500 was then advanced, and a minute of the transaction, stating the rate of interest on the advance, the terms on which the goods were to be redeemed, etc., was entered in the bank ledger, and was signed by the trader and stamped. Eleven months afterwards the trader became bankrupt.

It was held, that as the effect of the transaction was immediately to transfer the possession of the goods to the bank, the delivery order and minute did not require registration as a bill of sale and that the title of the bank was good as against the trustee in bankruptcy.

In his judgment (14 Q.B.D. at p. 393) Cave, J., said:

“I am satisfied on the construction of the Bills of Sale Acts that they do not include letters of hypothecation accompanying a deposit of goods by merchants or factors, or pawn tickets given by pawnbrokers, or in fact any case where the object and effect of the transaction are immediately to transfer the possession from the grantor to the grantee. In this case there was an actual transfer and possession of the leather by virtue of the transfer order sent by Hall to the railway company, and of the advice notes sent by the railway company to the bank, by which they undertook to hold the leather to the order of the bank; and, although I am of opinion that the minute of November 13, was intended to be a partial record of the transaction, I hold that the transaction itself was not one of those to which the Act of 1882 applies, and consequently that the minute of November 13, was not required to be in the form given in the schedule to the Act or to be registered.”

In this case the transaction fell, if at all, under the 1882 Act rather than the 1878 Act, but as the definition of “bill of sale” is common to both Acts, nothing turns on this and it is significant that although it was argued (at p. 388) that the delivery order and memorandum in the bank ledger together constituted a bill of sale, the judgment proceeded only upon the contention that the memorandum was a bill of sale (see p. 391), and the learned judge did not think it necessary to consider whether the delivery order itself was a bill of sale.

In *Grigg v. National Guardian Assurance Co.* (1) to which I have already referred, the headnote reads as follows:

“The plaintiff applied verbally to the defendants for a loan, offering as security certain furniture of his then at a warehouse in his name. The defendants made the loan to the plaintiff, who gave them a promissory note for the amount, and also signed a memorandum by which he agreed to pay interest on the amount of the note if not paid by the stipulated time. On the same day the plaintiff signed and handed to the warehouseman a delivery order, requesting him to ‘deliver’ to the defendants or their order

‘all property warehoused with you in my name on payment of your charges’: –

Held – that the delivery order was not a ‘bill of sale’ within the Bills of Sale Acts, 1878 and 1882, the whole transaction being one of pledge, and the effect of the delivery order being equivalent to actual possession by the defendants, the pledgees.”

In his judgment ((1891) 3 Ch. at p. 211) Kekewich, J., after setting out certain propositions, went on:

“It follows, in my opinion, from these propositions, that there is no document here which comes within the mischief of the Bills of Sale Acts. If there is any document at all it is a delivery order. A delivery order does not purport to contain, and would not well contain, the contract between the parties. The contract here was a parol one. The two memoranda which have been referred to relate only to the payment of money, and not to the security of the goods. With regard to the goods, the contract was by parol only. The goods were originally in the possession of the plaintiff. The delivery order was the means of changing this possession. The owner of the goods had not personally the possession of them. He signed the delivery order as an authority to the actual possessor, Taylor, to hand over the goods to his, the owner’s, pledgee; and the holding of the goods on behalf of the pledgee under this delivery order was equivalent to possession by the pledgee. When the delivery order had effected that result it had operated for all its purposes. The delivery order is not essential to the title of the grantee as against the grantor; that title was completed by the parol contract. It is essential for the purpose of requiring the physical possessor to hand over the goods to the grantee. As between the grantee and Taylor, it was for the purpose of satisfying Taylor that the grantee had contracted with the grantor.

It appears to me that the delivery order falls within that class of cases which has decided, as I have already mentioned, that a record of a transaction – in one of the cases it was a receipt, and in another it was a delivery order – is not within the Acts.”

The letter of May 1, 1961, with which we are concerned in this case appears to me to be indistinguishable in substance from the delivery orders which were considered in the last two cases, and I am satisfied that under the English Acts, such a document would not be a bill of sale.

I proceed to consider whether the position would be any different under the local law. It is to be noted first of all that the Ordinance contains no provision corresponding to s. 3 of the Act of 1878 whereby its application is limited in effect to cases where possession is not intended to be given. The definition of instrument in s. 2 is also in different terms from the definition of “bill of sale” under the English Act, and reads as follows:

“‘instrument’ means any instrument given to secure the payment of money or the performance of some obligation and includes any bill of sale, mortgage, lien, or any other document that transfers or purports to transfer the property in or right to the possession of chattels, whether permanently or temporarily, whether absolutely or conditionally, and whether by way of sale, security, pledge, gift, settlement or lease . . .”

There follows a list of specific instruments identical with those included in the English definition of “bill of sale”, of which it is only necessary to refer to (c) “other assurances of chattels”, and then a number of exceptions which are not at present material.

The question for decision is whether the definition in the Ordinance is to be construed as wider than the English definition to such an extent as to include within it a document such as the letter of May 1, 1961, and to apply, unlike the English Acts, to cases where, as is clearly the case here, possession is intended to be given.

The material words of the definition are those which refer to “any other document that transfers or purports to transfer the property in or right to possession of chattels.” So far as transfer of the property is concerned, that in my opinion was effected by the prior verbal agreement between Pichot and the plaintiffs, in accordance with s. 20 (a) of the Sale of Goods Ordinance (Cap. 31) which reads:

“(a) where there is an unconditional contract for the sale of specific goods, in a deliverable state, the property in the goods passes to the buyer when the contract is made, and it is immaterial whether the time of payment or the time of delivery or both be postponed.”

In any case, I do not see how it can be argued that a document addressed by Pichot to a third party, Express Transport, is either capable of transferring or in any way purports to transfer the property in the goods from Pichot to the plaintiffs. It is no more than a delivery order, taking effect under s. 30 (3) of the Sale of Goods Ordinance, which has already been cited, whereby not title but possession is passed. Now it is significant that the definition does not mention a document transferring the possession of chattels. What is referred to is the transfer of the right to possession, which is by no means the same thing. There is nothing in the wording of the definition which makes it applicable to a transaction whereby possession is in fact given to the grantee, and in this respect it appears to me that the scope of the Ordinance is no wider than the scope of the English Acts. I am fortified in this conclusion by consideration of the principal operative provision of the Ordinance, s. 13, which is to the same effect as s. 8 of the Act of 1878, and avoids unregistered instruments only as regards the property in or right to possession of chattels which at the material time are in the possession or apparent possession of the grantor. Here again we meet the expression “the property in or right to possession of chattels”, and in this context the words of the English section are identical. Even more significant is that the provision only operates where the chattels remain in the possession or apparent possession of the grantor. The dictum of Lord Esher, M.R., cited above is as applicable to the Ordinance as to the Acts: the instruments affected are those used in cases where chattels are transferred but possession is not intended to be given.

If I am right in holding that the letter is not an “instrument” as defined in the Ordinance, then prima facie it must take effect as a commercial document in its natural sense. As from the date of its receipt by Express Transport, and their acknowledgment to the plaintiff, Express Transport held the goods as agent for the plaintiffs and no longer as agent for Pichot. The constructive possession of Pichot had terminated and constructive possession by the plaintiffs had taken its place.

It is, however, argued by defence counsel that if there was no apparent change of possession, the possession remained as it was ab initio; that even if constructive possession changed the goods remained in the possession of Pichot, and that as long as they remained in the possession of Pichot they remained liable to attachment by the defendant.

I am satisfied that the authorities do not support such a proposition. The cases already cited show that constructive possession may change without any physical change of possession. In *Grigg's* case (1) ((1891) 3 Ch., at p. 211) Kekewich, J., stated as his fourth proposition “delivery, which is essential to a

pledge, may be effected without physical change of possession of the goods.” The proposition need not be confined to pledges, and its correctness is implicit in s. 25 (3) of the Sale of Goods Ordinance (already cited).

If the rule as to apparent possession were applicable there might at least be an arguable point. But the rule only applies if the document is an instrument to which s. 13 of the Chattels Transfer Ordinance applies, and I have held that this is not the case here. Even if the section did apply, however, I would have held that there was no apparent possession by Pichot. The decision relied on by the defendant, *Re Wood, ex parte Lewsham* (5) professes to follow *Ancona v. Rogers* (6) but that case does not deal with apparent possession, and the decision in *Re Wood* (5) appears to be inconsistent with the earlier decision in *Gough v. Everard* (7). In that case part of the property the subject of a bill of sale was timber lying on a public wharf. The timber was sold to the plaintiff, but after the sale remained in the same place in which it had been kept by the vendor. In a claim by an execution creditor it was held that the timber was in the actual possession of the plaintiff, as being completely under his control and as much in his possession as under the circumstances it could be. See per Pollock, C.B. (159 E.R. at p. 4) and per Martin, B., who (159 E.R. at p. 5) said that he could find no evidence of apparent possession in the vendor, or indeed in anyone.

I can deal more shortly with a further argument put forward by the defendant based on reg. 71 of the E.A. Customs Regulations which reads as follows:

“When the owner of any goods deposited in a warehouse desires to transfer them to another person, he and the person to whom it is desired to transfer the goods shall each complete and sign in the appropriate places a form of transfer in the form No. C.27.”

No such form of transfer was completed in this case. The argument is that this is a statutory requirement prescribing a particular mode of transfer, and that no other mode of transfer will be recognised in law. I do not so read the regulation. It may be that failure to comply with the regulation will render the parties liable to penalties, but the transfer itself cannot be invalidated by such failure, any more than in the case of a motor vehicle a transaction of sale would be affected by non-compliance with s. 9 (2) of the Traffic Ordinance (Cap. 403).

For the reasons given I hold that the property in the goods passed to the plaintiffs by reason of an agreement of resale made between Pichot and the French Commercial Counsellor as agent for the plaintiffs towards the end of April, 1961, that constructive delivery was affected as soon as Express Transport by their letter of May 8, impliedly acknowledged to the French Commercial Counsellor that they held the goods on behalf of the plaintiffs, that at the date of the order of attachment, i.e., June 14, 1961, the property in the goods was no longer in Pichot, and that he had no apparent possession by reason of which the goods must be deemed to continue in his possession at that date. For the above reasons the order of attachment so far as it concerns the goods the subject of these proceedings must be discharged.

The defendants must pay the costs of these proceedings including the amount of the storage charges incurred since the date of the order of attachment.

Order that the attachment order be discharged.

For the plaintiffs:

Buckley Hollister & Co., Nairobi

D. F. Shaylor and R. B. Varia

For the first defendant:

Khanna & Co., Nairobi

D. N. Khanna

The second defendant did not appear and was not represented.

Kanjeo Naranjee v Income Tax Commissioner
[1964] 1 EA 257 (PC)

Division:	Privy Council
Date of judgment:	7 April 1964
Case Number:	47/1962
Before:	Lord Evershed, Lord Morris of Borth-y-Gest and Lord Donovan
Sourced by:	LawAfrica
Appeal from:	E.A.C.A. Civil Appeal No. 58 of 1962 on appeal from the High Court of Tanganyika – Weston, J.)

[1] Income tax – Settlement – Settlor a trustee – Assessment – Income treated as income of settlor – Clause that settlement irrevocable – Whether settlor “able to have access by borrowing or otherwise” to income or assets of settlement – Meaning of words “is able to have access by borrowing or otherwise” in East African Income Tax (Management) Act, 1958, s. 25(4)(b).

[2] Statute – Construction – Taxing statute – Obscurity – Construction in favour of taxpayer.

Editor’s Summary

The appellant had made a settlement to make provision for his existing and future grandsons. The appellant and his wife were the trustees of the settlement and the property settled by the settlement consisted of shares in two companies. The operative clauses of the settlement provided that in no circumstances was the settlor to retain or become entitled to any beneficial interest under the settlement and that the settlement “shall be absolutely irrevocable in all circumstances”. Furthermore cl. 10 of the settlement provided inter alia that the trustees might invest the trust monies with any firm or company notwithstanding that the trustees or any of them might have an interest in such firm or company. The appellant, in respect of the “year of income 1958”, was personally assessed on the whole of the dividends received by the appellant and his wife as trustees of the settlement on the footing that such income had arisen “under a revocable settlement” within the meaning of s. 25(2) of the Income Tax (Management) Act, 1958. The appellant appealed against this assessment and the judge in dismissing the appeal held that the settlement was a revocable settlement by virtue of the terms of s. 25(4)(b) of the Act, because according to the meaning and effect of cl. 10 of the settlement, the appellant was “able to have access by borrowing or otherwise” to the income or assets of the settlement. The judge construed the words “is able

to have access by borrowing or otherwise” to mean that there was no lawful bar to be found in or under the settlement to the passing of any of the settlement income to the appellant and came to the conclusion that the appellant was able to have access by borrowing or otherwise to the income or assets of the settlement because the trustees could have lent the trust monies to the appellant as a member of a firm had he in fact been such a member. The decision of the judge was affirmed by the Court of Appeal for Eastern Africa and on further appeal to the Privy Council.

Held –

- (i) during the year of income 1958 the appellant was a trustee of the settlement and therefore it was incompetent for the trustees of the settlement to lend him personally any of the trust monies or income or to allow him to have access thereto otherwise than in his capacity as trustee;
- (ii) there was no evidence that the appellant was a partner in a firm which was within the category of those who could be said to have “the ability to have access” to the trust property, and even if the appellant had been a partner in such a firm, still it would in such circumstances have been to the firm as such that the possible lending would have been made and the access given;

- (iii) the words “is able to have access, by borrowing or otherwise” in s. 25(4)(b) of the East African Income Tax (Management) Act, 1958, in relation to a settlor in a settlement, pre-suppose that the settlor, if he falls into the contemplated category, has as an individual some existing characteristic, some positive ability, and it is not enough to say that there must be in the settlement some bar or disqualification to his having access to any of the trust property;
- (iv) the “access” which a settlor must be able to have in order that a settlement should be treated as revocable within the meaning of s. 25 *ibid.*, must clearly be “access” otherwise than in his capacity as a trustee;
- (v) in respect of the tax year 1958 the appellant was not a person who could properly be described as “under the terms of the settlement . . . able to have access . . .” to any part of the trust property or its income.
- (vi) if the language of a revenue Act is obscure, the taxpayer is entitled to demand that his liability to a higher charge should be made out with reasonable clearness, before he is adversely affected. Dictum of Viscount Simon in *Scott v. Russell* (2), applied.

Appeal allowed.

Cases referred to in judgment:

- (1) *Wolfson v. Commissioners of Inland Revenue*, [1949] 1 All E.R. 865; 31 T.C. 141.
- (2) *Scott v. Russell (Inspector of Taxes)*, [1948] 2 All E.R. 1; 30 T.C. 394.

Judgment

Lord Evershed: This appeal has raised before their Lordships the question of the meaning of a few words in the East African Income Tax (Management) Act (No. 10) of 1958. The relevant words are found in subs. (4) of s. 25 of that Act and are: “For the purposes of this section a settlement shall be deemed to be revocable if under its terms the settlor . . . (b) is able to have access, by borrowing or otherwise, to the whole or any part of the income arising under the settlement or of the assets comprised therein”. The words are upon the face of them simple enough; but the problem presented by their meaning in their context and in the circumstances of the present case have proved far indeed from simple. Weston, J., in the High Court of Tanganyika in a most careful judgment arrived at a conclusion adverse to the appellant and in favour of the respondent, the Commissioner of Income Tax; and his conclusion was unanimously confirmed by Her Majesty’s Court of Appeal for Eastern Africa, consisting of Sir Ronald Sinclair, President, Sir Trevor Gould, Justice of Appeal, and Mr. Justice Mayers, Acting Justice of Appeal. Of these three learned judges, Mayers, J., delivered the leading judgment in which he carefully reviewed all the cases cited before the court. Both Sir Ronald Sinclair and Sir Trevor Gould delivered short independent judgments agreeing with Mayer, J.’s, conclusion. In these circumstances their Lordships have felt considerable diffidence in expressing a view different from that which had appealed to all the judges in East Africa; but after a most careful consideration of all the arguments they have felt in the end compelled so to do.

The proceedings arose out of two settlements, one made by the appellant before their Lordships, Mr. Kanjee Naranjee and the other by his wife, Ujambai Kanjee Naranjee. The two settlements appear to

have been in all relevant respects in identical language so that before their Lordships' Board (as indeed,

as they understand, in the courts below) reference was made only to the language of the former of the two settlements, it being conceded that a conclusion as regards that settlement must necessarily apply equally to the other. In this judgment, therefore, their Lordships will confine themselves only to the settlement made by the appellant. The settlement is dated June 5, 1955, and the parties thereto are expressed to be, (1) the appellant as settlor (2) the appellant and (3) the appellant's wife, Ujambai Kanjee Naranjee, the second and third parties being defined as "the trustees of the settlement". The purpose of the settlement as expressed in its first recital was to make provision for the existing and future sons of three sons of the settlor and by the terms of the operative clauses of the settlement it is made clear that in no circumstances (that is to say, if all the trusts in favour of the grandsons indicated should wholly fail) does the settlor (or his wife) retain or become entitled to any beneficial interest under the settlement. Moreover, by its second recital it is stated that the settlement "shall be absolutely irrevocable in all circumstances".

The property settled by the settlement consisted of shares in two companies known as Kanjee Naranjee Finance Corporation Limited and Kanjee Naranjee Limited, both incorporated in Tanganyika. It may be stated (1) that the shares in the Finance Corporation are held by a number of persons all, it is assumed, closely connected with the appellant or his wife who are its sole directors, and (2) that the shares in the Kanjee Naranjee Company Limited are held as to one each by the appellant and his wife personally and as to the balance by the appellant and his wife as trustees of the settlement; the appellant and his wife being again the sole directors but (in this case) the appellant is under the company's articles of association its governing director for life. The settlement contains the usual power for the trustees to continue to hold the shares originally settled or, (in this case with the Settlor's consent) to dispose of them and (again with the same consent) to invest the proceeds of sale in any investments of the nature authorised by cl. 10 of the settlement. The terms of cl. 10 are of vital significance for the purposes of the present proceedings and they are as follows:

- "10. The Trustees may invest any money for the time being subject to the trusts of this settlement in any investments authorised by law or in or upon ordinary preference preferred deferred or other stock or shares of any public or private company wherever incorporated or carrying on business or in making loans secured or unsecured or fixed deposits to or with any person firm company or bank and they may so invest notwithstanding that the Trustees or any of them may have an interest in such public or private company or such firm company or bank."

It becomes now necessary for their Lordships to set out in full the first four subsections of s. 25 of the Income Tax (Management) Act above mentioned. These terms are as follows:

- "25(1) All income which in any year of income accrued to or was received by any person under a settlement, whether revocable or not and whether made or entered into before or after the commencement of this Act, from assets remaining the property of the settlor shall be deemed to be income of the settlor for such year of income and not income of any other person.
- (2) All income which in any year of income accrued to or was received by any person under a revocable settlement shall be deemed to be income of the settlor for such year of income and not income of any other person.
- (3) Where in any year of income the settlor, or any relative of the settlor, or any person under the direct or indirect control of the settlor or of any of his relatives, by agreement with the trustees of a settlement in any

way, whether by borrowing or otherwise, makes use of any income arising, or of any accumulated income which has arisen, under such settlement to which he is not entitled thereunder, then the amount of such income or accumulated income so made use of shall be deemed to be income of such settlor for such year of income and not income of any other person.

- (4) For the purposes of this section, a settlement shall be deemed to be revocable if under its terms the settler –
- (a) has a right to reassume control, directly or indirectly, over the whole or any part of the income arising under the settlement or of the assets comprised therein; or
 - (b) is able to have access, by borrowing or otherwise, to the whole or any part of the income arising under the settlement or of the assets comprised therein; or
 - (c) has power, whether immediately or in the future and whether with or without the consent of any other person, to revoke or otherwise determine the settlement and, in the event of the exercise of such power, the settlor or the wife or husband of the settlor will or may become beneficially entitled to the whole or any part of the property comprised in the settlement or to the income from the whole or any part of such property:

Provided that a settlement shall not be deemed to be revocable by reason only that under its terms the settlor has a right to reassume control, directly or indirectly, over any income or assets relating to the interest of any beneficiary under the settlement in the event that such beneficiary should predecease him.”

The only other reference to the Act which their Lordships need make is to its second section which (by the first subsection) provides that “the year of income” therein mentioned means the calendar year and (by subs. (2)) that references to the word “under” in relation to a settlement include references to “in accordance with, by virtue of and in consequence of” such settlement.

The present proceedings arose out of the circumstance that the appellant had in respect of the “year of income 1958” been personally assessed in respect of the whole of the dividends received by the appellant and his wife as trustees of the settlement on the footing that such income had arisen “under a revocable settlement” within the meaning of s. 25 (2) of the 1958 Act: and it has been and was before their Lordships the contention of the Commissioner for Income Tax that the settlement here in question was a revocable settlement by virtue of the terms of s. 25(4)(b) of the Act, because according to the meaning and effect of cl. 10 of the settlement the settlor was “able to have access by borrowing or otherwise” to the income or assets of the settlement: and this contention (as already stated) has found favour with all the Judges in East Africa before whom the case came. Their Lordships hope that they will not be thought disrespectful to these learned judges if they do not at length relate the reasoning in their judgments or cite at length from them. Before the High Court and the Court of Appeal in East Africa numerous citations were made from English decisions including particularly House of Lords decisions. Before their Lordships these citations were less in number though counsel for the appellants, strongly relied upon the speeches of Lord Simonds and Lord Morton in the case of *Wolfson v. Commissioners of Inland Revenue* (1) (31 T.C. at pp. 167 and 171). Their Lordships agree with the learned judges in Africa in thinking that the observations of Lord Simonds and Lord Morton in *Wolfson’s* case (1) cannot be conclusive in favour of the appellant’s argument here and cannot indeed potently support it; for in the *Wolfson* case (1), the vital words in the

corresponding English statute were “if and so long as the terms of a settlement are such that . . .”; and it was the view of the noble Lords referred to that the fact that the settlor could bring to an end the settlement then in question by getting the relevant company (the shares in which were the subject of the settlement) wound up (as he could) was a fact which was altogether *dehors* the settlement itself and which could not be invoked to make good the argument of the Commissioner for Inland Revenue that the terms of the settlement were such that the settlor could bring it to an end. In the present case the facts and circumstances are essentially different. The question before their Lordships is whether “under” (that is, in consequence of) the settlement and particularly in consequence of the language of cl. 10 the settlor “is able to have access” by borrowing or by any other means to any of the income or assets of the settlement. Inevitably therefore the answer to the problem turns on the scope and meaning which the legislature must be taken to have intended to be attached to the formula “is able to have access to” – a formula which, as their Lordships were informed and readily accept, is not to be found in any other similar legislation. All the learned judges in the courts below naturally and properly drew attention to the contrast between the “ability” postulated by para. (b) of the subsection and the words “right” and “power” specified in paras. (a) and (c) respectively. Founding upon this contrast Weston, J., in the High Court concluded that by the words “able to have access” was intended “has the legal competence to have access” and thought that the sense thereby conveyed was the same as the sense conveyed when it is in England said that everyone is able to have access to the courts of justice or to the Ritz Hotel; and that it was accordingly irrelevant that the individual wishing to have such access must first take the steps necessary to get himself to the courts or to the Ritz Hotel. In other words the essential formula meant (according to the learned judge) that there was no lawful bar to be found in or under the settlement to the passing of any of the settlement income to the settlor. The learned judge accepted that because the settlor was one of the trustees, there would be a “lawful bar” derived from the well known rule of equity against the trustees lending to one of themselves – such bar being preserved of necessity by the implication of the final words of the clause “and (the Trustees) may so invest notwithstanding that the Trustees or any of them may have an interest in such public or private company or such firm company or bank”. But in the view of the learned judge, particularly having regard to the words just recited, there was or would be no bar to the trustees lending to the settlor as a member of a firm. Before leaving the judgment of Weston, J., their Lordships observe that in the view which he took the effect of the words of para. (b) were of wider implication than would have been the case if they had read “is enabled to have access”. As later appears their Lordships have not been able to discern a real difference between the words “is able to have access” and “is enabled to have access” – unless it is to be taken that the second formula imports an expression implicit in cl. 10 that the settlor is as such given *power* to have access to the settlement property notwithstanding that he is also a trustee.

The view of the judges in the Court of Appeal was to the same effect as that of Weston, J. Mayers, J., observed (at p. 53 of the record) that there was nothing in the settlement to restrict the category of persons to whom loans might be made under cl. 10, the disability of the appellant in his personal capacity being derived from the rule of equity from which he could relieve himself at anytime by retiring from the trusteeship. In the view of that learned judge the words of para. (b) meant no more than the settlor “had the capacity to get access to the trust property” and signified that

“ . . . the settlor is a person who can otherwise than in contravention of the terms of the settlement have access to its funds in the event of his

doing whatever acts and things may be necessary for him to obtain such access.”

Sinclair also directed himself particularly to the final words of cl. 10 comprehending a firm of which the trustee might be a partner and was of the view that the settlor was “competent” to have access to the trust property and not the less so because he might have first to take some preliminary step, well within his power, to get the necessary capacity. Finally, Gould, J.A., also referring to the case of a partnership of which the settlor might be a member concluded that the settlor’s ability to borrow would not arise from any power acquired by him as a partner but “. . . the terms of the settlement place him as a partner, in the category of persons who may borrow”.

Before their Lordships counsel for the respondent, the Commissioner of Income Tax, naturally relied upon the arguments which had been accepted by the Eastern African Court of Appeal. He was however before their Lordships disposed to put in the forefront of his argument that the settlor could at any time place himself within the category of persons contemplated by para. (b) of the subsection by the mere act of retiring from the trusteeship of the settlement – which he could well do upon his own initiative without the concurrence of anyone else. Counsel for the respondent did indeed suggest that even as a trustee the settlor was not debarred by anything in the settlement from being a borrower of the trust funds or income notwithstanding that in the court below it had been conceded that as a trustee he could not, under the general rule of equity, borrow from himself and his co-trustee and notwithstanding that such a submission was not put forward in the respondent’s case before their Lordships. Counsel for the respondent did not however press this point; and in any event their Lordships are satisfied that the necessary inference of the final words of cl. 10 of the settlement is that so long as the settlor remains one of their number the trustees of the settlement could not, under the well-established equitable rule, lend to him. On the other hand counsel for the respondent did not suggest that the settlor could properly be said to be “able to borrow” or otherwise have access to the trust property or income by virtue of being the sole governing director of a limited company, for in such case it would be in truth to the company that, in the event suggested, the lending would be made or the access given.

There can be no doubt that the reasoning of the judges in the courts below and the arguments put forward on behalf of the respondent are of great weight and force. If, however, in the light of the arguments of each side the question for determination may be said to be extremely finely balanced, their Lordships have in mind what was said by Lord Simon in his speech in the case of *Scott v. Russell (Inspector of Taxes)* (2) (30 T.C. at p. 424):

“I must add that the language of the rule is so obscure and so difficult to expound with confidence that – without seeking to apply any different principle of construction to a revenue act than would be proper in the case of legislation of a different kind – I feel that the taxpayer is entitled to demand that his liability to a higher charge should be made out with reasonable clearness before he is adversely affected.”

As indicated at the beginning of this judgment their Lordships have in the end reached the conclusion that the respondent’s case for the appellant’s personal liability to be taxed in respect of the income of the trust property for the year of income 1958 is not made out. It is to be noted that the liability to tax is imposed by subs. (2) of the relevant section which provides that

“all income which in any year of income accrued to . . . any person under a revocable settlement shall be deemed to be income of the settlor for such year of income . . .”

The office of subs. (4) is to define what is meant by the words “revocable settlement”. The question then is – did the income here in question in the tax year 1958 accrue under a revocable settlement? In that year the appellant was in fact a trustee of the settlement and although no doubt he could or might have retired as such he did not do so. It was therefore during that year incompetent for the trustees of the settlement to lend to him personally any of the trust monies or income or allow him to have access thereto otherwise than in his capacity as trustee. Nor is there any evidence that during the year 1958 the settlor was in fact a partner in any firm. Even however if he had been and the firm to which he belonged was within the category of those who could be said to have “the ability to have access” to the trust property, still it would in such circumstances have been to the firm as a firm that the possible lending would have been made and the access given, although it is no doubt true that the settlor as partner would have been, with other partners, personally liable to repay. In the case postulated that to which the settlor or an individual would have access would be money which had become a partnership asset and not part of the settlement funds. In their Lordships’ view the legal conclusion flowing from such a transaction is essentially the same as that in the case of the corporation solely controlled by the appellant in which case it would have been the Corporation and not the settlor in his personal capacity who would have had the necessary ability under para. (b) of the section – and none the less so even if the settlor were required to guarantee the loan.

Their Lordships do not forget the point already mentioned that the essential words in para. (b) are “is able” – words which are to be distinguished without doubt from the words “right” and “power” used in paras. (a) and (c) of the subsection. Nevertheless their Lordships cannot in the context accept the view that the words “is able” mean or intend “capacity” in a sense so wide as to cover any person who is not, as a person, somehow barred or disqualified by the terms of the settlement from having access to the trust property and therefore to comprehend any person in the world notwithstanding that as a matter of practical necessity he has to take possibly elaborate steps first in order to put himself in the qualified class. True it is that the use of the words “by borrowing or otherwise” presuppose that the trustees will be willing parties to the transaction contemplated so that a person may properly fall within the scope of para. (b) notwithstanding that the concurrence of the trustees will be required before he can in fact enjoy access to the trust property. Nonetheless it has in the end seemed to their Lordships that the use of the vital words “is able” supposes that the settlor, if he falls within the contemplated category, has as an individual some existing characteristic, some positive ability (as it was put by counsel for the appellant) and that it is not enough to say that there must be in the settlement some bar or disqualification to his having access to any of the trust property in order to prevent him from being comprehended within the paragraph. It is pertinent, in their Lordships’ opinion, to observe that the “access” which the settlor must be able to have in order that the settlement should be treated as revocable within the meaning of the section must clearly be “access” otherwise than in his capacity as a trustee. The contrary was not indeed suggested. The point however as their Lordships think is to emphasise that by the words in question the legislature must have contemplated what is referred to above as a positive ability or characteristic possessed by the settlor in his personal or private capacity as distinct from an ability which he might have in fact in some other capacity. If this view is not right, then it would follow that any settlement of which the settlor happened to be a trustee would be “revocable” within the terms of the section even though the terms of the settlement were such as to make it clear that the trustees were prohibited from allowing any of the trust property or its income to get into the hands of the

settlor, as a borrower or in any other way, in his private or personal capacity. Normally indeed such an ability or characteristic would properly be called either a right or a power and the use by the legislature of the words “is able” may well have been deliberately intended to cover both rights and powers and perhaps (if there be any such) some other qualification which though conferring upon the settlor in his private or personal capacity an ability or capacity for the purposes in question might not properly be called either a right or a power. Their Lordships have already said that the question involved is indeed most finely balanced; and nowhere is this better shown than in that part of Weston, J.’s, judgment in which he distinguished the words “is able” from the words “is enabled”. It may not be useful to attempt to expound upon the question by way of illustration – for in the end the answer must depend upon the impression made on the mind by the simple words that are used. But suppose that instead of the word “person” in cl. 10 of the settlement the words had been “person resident for the time being in Nairobi”, would not the contrary argument involve the proposition that the paragraph would apply to the settlor although not during the relevant year resident in Nairobi because he could by acts of his own volition at any time acquire such residence? Their Lordships accept the submission put forward by counsel for the respondent that para. (b) of the subsection should be regarded in some sense as a “sweeping up” provision intended to prevent evasion of taxation by any means however ingenious or elaborate. But if the respondent’s view of the meaning of para. (b) is accepted it is clear that not only both paras. (a) and (c) of subs. (4) but also subs. (3) would appear to be entirely otiose. True it is that upon the construction which their Lordships give to para. (b) the other two paragraphs of subs. (4) may be said to be in large measure (though not entirely) otiose. Still the legislature thought fit to enact all three paragraphs – and it is to be noted that para. (b) is inserted between paras. (a) and (c) and not – as would normally be the case with a “sweeping up” provision in the ordinary sense – at the end.

Their Lordships have therefore with all respect to the contrary views of the learned judges in the courts below ultimately reached the conclusion that in respect of the tax year 1958 the settlor was not a person who could properly be described as “under the terms of the settlement . . . able to have access . . . “ to any part of the trust property or its income.

Their Lordships will report to the President of Tanganyika their opinion that the appellant’s appeal against the dismissal by the Court of Appeal for Eastern Africa of his appeal against that part of the order of the High Court of Tanganyika which confirmed the amended assessment upon him for income tax in respect of the income for the year 1958 of the two settlements made by him and his wife in 1955 should be allowed and that such assessment should be discharged accordingly and that the respondent should pay the costs of this appeal and the costs in the Court of Appeal and the whole of the costs (not one half) in the High Court of Tanganyika.

Appeal allowed.

For the appellant:

Linklaters & Paines, London

H. H. Monroe, Q.C. and Stewart Bates (both of the English bar)

For the respondent:

Charles Russell & Co., London

R. Borneman, Q.C. (of the English bar) and G. C. Thornton (Deputy Legal Secretary, E.A. Common Services Organisation)

Re an Application by Bourjois Ltd **[1964] 1 EA 265 (HCU)**

Division: High Court of Uganda at Kampala
Date of judgment: 16 May 1964
Case Number: 17/1964
Before: Fuad J
Sourced by: LawAfrica

[1] Trade mark – Application to register – Application for words “Soir de Paris” – Registration in respect of perfumes and cosmetics – Goods not manufactured in France – Registration refused as likely to deceive – Appeal – Trade Marks Ordinance, 1952, s. 14 (1) (U.).

Editor’s Summary

The Registrar of Trade Marks rejected application of the appellant for registration of the words “Soir de Paris” in respect of “perfumed soap, perfumery, cosmetics, hair lotions and dentrifices” on the ground that the proposed mark infringed s. 14 (1) of the Trade Marks Ordinance, 1952. The Registrar held that people would be deceived by the mark “Soir de Paris” into thinking that the goods originated from France, if not Paris itself, and they would be induced to buy goods which they would not have bought if they knew that the goods were not manufactured in France. On appeal,

Held –

- (i) the class of persons who would buy such goods would be sophisticated and there was no likelihood that they would be deceived into thinking that the goods were of French origin;
- (ii) the proposed trade mark “Soir de Paris” did not infringe s. 14 (1) of the Trade Marks Ordinance, 1952.

Appeal allowed.

Cases referred to in judgment:

- (1) *Aristoc v. Rysta*, [1945] 1 All E.R. 45; (1945), 62 R.P.C. 65.
- (2) *Re Broadhead’s Application* (1950), 67 R.P.C. 209.
- (3) *Hack’s Application* (1941), 58 R.P.C. 91.

Judgment

Fuad J: This is an appeal under s. 20 of the Trade Marks Ordinance, 1952, from the decision of the Registrar of Trade Marks refusing an application by the appellant to register the words “Soir de Paris” in Part A of Class 3 of the register in respect of “perfumed soap, perfumery, cosmetics, hair lotions and

dentrifices”.

The learned Registrar held in a reasoned decision dated November 27, 1963, that the proposed mark infringed the provisions of subs. (1) of s. 14 of the Ordinance on the grounds that it would “be likely to deceive or cause confusion”.

Section 14 (1) of the Ordinance is in the following terms:

“14(1) It shall not be lawful to register as a trade mark or part of a trade mark any matter the use of which would, by reason of its being likely to deceive or cause confusion or otherwise, be disentitled to protection in a court of justice, or would be contrary to law or morality, or any scandalous design.”

It should be noted that this subsection is in terms precisely similar to s. 11 of the Trade Marks Act, 1938, of the United Kingdom.

I think the following matters are common ground:

- (a) that it was for the appellant to satisfy the Registrar on the application for registration that the mark is registerable in that it does not offend the law;
- (b) that the Registrar in considering an application has an administrative and quasi-judicial function; and
- (c) that the Registrar is charged with the duty of protecting the interests of the public at large.

This is not a case where the Registrar was considering an opposition made by any person or persons. Viscount Simonds in *Aristoc v. Rysta* (1), expressed the view, with which I respectfully agree, that “the precise scope of s. 11 (of the U.K. Act) is not easy to define”. The full report of this case is not available to me but in *Re Broadhead’s Application* (2), Evershed, M.R., had this to say:

“In the course of the argument, attention has been drawn to the somewhat curious syntax of that section, and also to the provision that the mark which it is unlawful to register is not one the use of which, simpliciter, would be likely to cause confusion or to deceive, but which, for the reason that it would be so likely or for other reasons, would be disentitled to protection in a court of justice. What precisely that means it is fortunately not now necessary to determine . . .”

Most of the cases cited to me in the careful arguments of counsel for the appellant and counsel for the respondent are cases where some form of opposition was raised but I do not think it can be argued (despite the difficulties inherent in s. 14 (1) of the Uganda Ordinance) that the Registrar is not entitled to act under that section unless opposition is made. In “opposition cases” (if I may call them thus) the Registrar, bearing in mind the interests of the public in general, will have regard to the reputation acquired by the opponent’s mark but in a case such as this the interests of no person or body of persons are involved and the Registrar was concerned only with the protection of the public and the provisions of the law. It was no part of counsel for the appellant’s case that opposition was necessary before the relevant section applied.

If I understand counsel for the respondent’s arguments correctly he laid stress on the fact that the Registrar had a judicial discretion to exercise and that she had so exercised the discretion vested in her. It is clear from the authorities that the Registrar does indeed have a discretion in that a mark may be refused registration even though it does not fall within one of the express prohibitions contained in the relevant law, a discretion which is to be exercised judicially founded upon principles to be deduced from that law. (Kelly on Trade Marks, 8th Edn., p. 38).

It is apparent that Registrars often rely upon the provisions of the law and upon their discretion in refusing applications. In this case, however, it is clear from the learned Registrar’s decision that she was basing her findings only upon the construction of s. 14 (1) of the Ordinance and did not purport to exercise her discretion. There is an essential difference. In *Hack’s Application* (3) (58 R.P.C. at p. 98), Morton, J., said:

“What the Registrar had to decide in the first instance under s. 11 . . . is a question of fact. In deciding it, the Registrar is not, in my view, exercising a discretion at all . . . The discretion of the Registrar arises if, and only if, he decides that preliminary question of fact in favour of the applicant; he has a discretion to register or refuse the registration. That I do not doubt, but in differing from the decision of the Registrar in this case, I am differing from him on a point which is a matter for adjudication upon facts and not a matter of the exercise of discretion.”

Had the learned Registrar exercised a discretion it would only have been subject to review on grounds which are well understood. However, this is an appeal and I have no doubt that I should not interfere with the decision appealed against unless the Registrar has clearly erred. So much can be gathered from the judgment of Evershed, M.R., in *Re Broadhead's Application* (2) (67 R.P.C. at p. 213) and the authorities therein cited. It is clear that whether or not the conditions in s. 14 (1) are satisfied is *prima facie* a question of fact or inference drawn usually from the evidence submitted. In this case no evidence was before the Registrar and her decision was little more than an expression of opinion. Before I interfere I think I must be satisfied that her opinion (if I may call it this) was not tenable on the material she had before her (which is, of course, the same material that I have before me).

I am satisfied that the test applied by the learned Registrar was the correct one (see the last paragraph of p. 1 of her "Ruling"). This test was, no doubt, culled from Kerly, p. 168, leaving out the first sixteen words which would only be relevant in "opposition cases". She correctly stated on whom the onus lay and if I may say so at once it is clear that she gave the matter before her the most careful consideration. Evershed, M.R., in *Re Broadhead's Application* (2), indicated that an appellate court should bear in mind that

"the subject matter in such a case as this is one with which the Registrar . . . (is) particularly well versed, and the greatest weight should therefore be attached to (his) experience in such matters."

I respectfully agree that this is a consideration that I must bear in mind but it must not be forgotten that appeal to this court is by way of re-hearing and this court is free to exercise its own mind. (*Hack's Application* (3) (58 R.P.C., at p. 107).

The decision of the Registrar is, in effect, contained in the following passage which occurs (after she has considered the authorities cited to her):

"The words of the submitted mark 'Soir de Paris' are in French and I consider the average member of the public would recognise the language as French even although they may not know the meanings of the individual words. They would be greatly assisted in this conclusion by the presence of the word 'Paris', for this, of course, has the geographical significance of being the capital town of France. The inclusion of the word 'Paris' is important, for my decision if the trade mark had merely consisted of ordinary words in French may well have been different. Mr. James argued that 'Soir de Paris' does not give an inference of a connection with France: the connection could equally well have been with Belgium or the Congo. This I agree might have been the position if the trade mark had been composed of ordinary words in French, but I do not agree with this submission because of the word 'Paris' which connects only with France. I also take into consideration the fact that Paris is well known and famous as a city for its fashion, perfumes and cosmetics and it is to be noted that the specification of goods covers perfumed soap, perfumery and cosmetics. There is, therefore, not merely a suggestion that the goods originate from a country which in fact is not the country of manufacture, but the country suggested, i.e., France, is one that enjoys a world-wide reputation for a high standard in the main products to be produced and sold under the trade name. Having considered all the circumstances carefully, I am of the opinion that a substantial number of persons would be deceived by the mark 'Soir de Paris' into thinking that the goods originated from France, if not Paris itself, and bearing in mind the reputation that Paris enjoys for perfumery and cosmetics would be

induced to buy goods that they would not have bought if they knew the products was not connected with France in any way.”

It will be seen that having regard to all the matters argued before her, the learned Registrar formed the opinion that if the mark were used a considerable number of persons would conclude that the goods in question had a French origin and were in some way associated with Paris or France. She also took into account that the applicant had a French name (see para. 2 of p. 3 of her ruling).

I have to consider whether, applying the principles I have set out above, the appellant has satisfied me that the Registrar’s decision was wrong. This is no easy matter. Though the cases cited to me by counsel are helpful and I have referred to others, I do not think that they afford me any assistance in coming to my conclusions. Each case must be decided on its own peculiar facts and there is no exact parallel in any of the cases to which I have referred.

Though the onus was on the applicant (and is now on the appellant) I think that it must be borne in mind that the section does not say, as it might have done, that the mark can be refused if in the opinion of the Registrar it is likely to cause confusion or deceive. (Cf. s. 19 (2) of the Companies Ordinance, 1958.)

The Registrar was right, on the authorities, to consider the possibility of deception of the “unwary purchaser” and not of the “educated man” or “the man of precise character”. However, I am of the opinion, with respect to her conclusions, that she should have had more regard to the class of persons who are likely to be “unwary purchasers” of the goods in question. What must be considered in this case is the class of persons who have the necessary sophistication to wish to buy perfume, perfumed soap, cosmetic, hair lotions and tooth paste. We are not concerned with the large number of persons who would never think of buying such articles.

The learned Registrar, it will be seen, considered that the average member of the public would recognise that the words “Soir de Paris” are French words though she thought they may not know the meanings of the individual words. I do not agree with this opinion. It seems to me that the likely purchaser of the goods in question, be he most unwary would, if he recognised the words as being French at all, know what these words meant. They mean, of course, “an evening in Paris”, and I do not think I require the services of an interpreter on this matter. Would these words be likely to cause confusion or to deceive a possible purchaser? Would he conclude that the goods had a French origin or were in some way associated with Paris or France? (See the penultimate paragraph of p. 3 of the Registrar’s ruling.) The possibility of deception or confusion might exist but s. 14 (1) of the Ordinance speaks of likelihood which is a very different thing.

It seems to me, with respect to the learned Registrar, that the class of persons concerned would not be likely to be deceived or confused. No doubt the appellants wish the words “Soir de Paris” to appear on their products because of the aura of romance that attaches in the minds of some persons to “all things French”. And why not? Who would buy perfume labelled “Nights in West Hartlepool”? Of course the intention of the appellant is irrelevant, the test being an objective one, but I do not think that the fact that some persons may have an exaggerated idea of the allure of “things French” disentitles the appellant from seeking to take advantage of what is possibly a popular conception (or misconception).

I have now to consider the position of the unwary purchaser who has no knowledge of even “school-boy French” and recognises only the word “Paris” Would he be likely to be deceived into thinking that the goods had a French origin which they have not? I am of the opinion that a reasonable likelihood does not

exist. I do not see how such a purchaser would be likely to assume that the presence of a place-name together with other words indicates a place of origin. If the word had been “Nuit” with “Paris” printed separately and below the position would have been different. If an article is marked “London Pride” and another marked “Hawaiian Nights” I do not think that the class of persons with whom we are concerned would be likely to conclude that the articles came from London or Hawaii respectively.

Had the words before “Paris” indicated some sort of product of that city the matter may have been different. Here, I am of the opinion, the words in the proposed mark are no more objectionable than would be the words “Mademoiselle de Paris”, or “Femme de France” or “Nuit D’Afrique”.

It will be seen that I have not taken into consideration the matters referred to in the letter annexure “G” though counsel for the appellant submitted that the letter was admissible and relevant. I consider the fact that the mark “Evening in Paris” was registered in Uganda in 1936 and the fact that many other countries have allowed the registration of the mark “Soir de Paris” is entirely irrelevant even if it is admissible. Different standards (or even different law) may have obtained.

After the most anxious consideration, therefore, I hold that the learned Registrar was wrong in her conclusions.

Counsel for the appellant submitted before the Registrar that the applicant company would be prepared to print “Made in England” on their products if the mark was allowed to be registered though he submitted this was unnecessary. I took the point of my own motion and counsel for the appellant before me argued that this condition could be imposed making the same submission before me regarding the necessity of the condition. Counsel for the respondent submitted that the Registrar was right in deciding that this condition, if it were imposed, would not cure the defect.

Section 52 of the Ordinance makes it clear that I have the same discretion as had the Registrar. I have to consider whether I should exercise a discretion and not allow the registration notwithstanding my decision that s. 14 (1) of the Ordinance would not be infringed. I must also decide whether I should exercise my discretion and impose the condition referred to myself. After careful consideration I do not think it would be right to require any condition of this nature; I therefore decline to exercise the discretion vested in me.

The appeal is allowed. I direct the application to proceed and make no other order under the provisions of subs. (5) of s. 20 of the Ordinance. The question of costs does not arise (s. 48).

I do not wish to be understood that I would have awarded costs against the Registrar had I power to so order, on the facts in this case, but it will be obvious that there might be cases where a notional Registrar might act capriciously and an applicant might be put to the unnecessary expense of coming to this court. I notice that costs can be awarded against the Registrar in some circumstances under s. 48 of the U.K. Trade Marks Act, 1938. I hope this matter may receive the attention of the legislature. I also note that there are several anachronisms in the Ordinance that, it might be considered, call for amendment.

Appeal allowed.

For the appellant:

Hunter & Greig, Kampala

A. I. James

For the respondent:

The Registrar of Trade Marks, Uganda

A. Wither (Deputy Administrator General, Uganda)

Hamed Abdallah v Republic
[1964] 1 EA 270 (HCT)

Division: High Court of Tanganyika at Tanga
Date of judgment: 14 February 1964
Case Number: 10/1963
Before: Biron J
Sourced by: LawAfrica

[1] Transport licensing – Mens rea – Failure to comply with special condition of road service licence – Offence committed by employee – Offence committed without knowledge of licence-holder – Licence-holder charged with offence – Transport Licensing Ordinance (Cap. 373) s. 26 (T).

[2] Criminal law – Mens rea – Transport licensing – Transport Licensing Ordinance (Cap. 373) s. 26 (T).

Editor's Summary

The owner and holder of a licence for a public service vehicle was convicted of failing to comply with a special condition of his road service licence contrary to s. 23 (3) and s. 26 of the Transport Licensing Ordinance. On appeal against conviction it was common ground that he was not on the vehicle when the offence was committed or that he was a party thereto or even knew of it. It was submitted that no offence had been committed by the appellant, as s. 26 (1) did not impose absolute liability upon him.

Held – s. 26 (1) of the Transport Licensing Ordinance creates an absolute liability, and it was no defence that the appellant was not a party to or even aware of the breach of the special condition.

Appeal dismissed.

Cases referred to in judgment:

- (1) *Lim Chin Aik v. R.*, [1963] 1 All E.R. 223.
- (2) *Sherras v. De Rutzen*, [1895] 1 Q.B. 918; [1895] All E.R. Rep. 1167.
- (3) *Cundy v. Le Cocq* (1884), 13 Q.B.D. 207.
- (4) *Hobbs v. Winchester Corpn.*, [1910] 2 K.B. 471.

Judgment

Biron J: The appellant, the owner of a public service vehicle, was convicted of failing to comply with a special condition of his road service licence contrary to ss. 23 (3) and 26 of the Transport Licensing Ordinance, and he was fined Shs. 500/- or imprisonment for four months in default. He is now appealing.

The charge, as indicated, was laid under ss. 23 (3) and 26 of the Transport Licensing Ordinance (Cap. 373, Supp. 56 Revised Laws. They respectively read:

“23(3) The licensing authority may attach to a road service licence such conditions as it may think fit with regard to the matters to which it is required to have regard under this Ordinance and, in particular, for securing that:

- (a) the fares shall not be unreasonable;
- (b) where desirable in the public interest, the fares shall be so fixed as to prevent wasteful competition with alternative forms of transport, if any, along the routes or any part thereof, or in proximity thereto;
- (c) copies of the time table and fare table shall be carried and be available for inspection in vehicles used on the service;
- (d) passengers shall not be taken up or shall not be set down except at specified points, and generally for securing the safety and convenience of the public.”

“26(1) Subject to the provisions of this section, any person who fails to comply with any condition of a licence held by him shall be guilty of an offence against this Ordinance and shall be liable in the case of a first offence to a fine not exceeding one thousand shillings and in the case of a second or any subsequent conviction to a fine not exceeding two thousand shillings.”

Subsection (2) of this section is not relevant.

[The judge went on to deal with several grounds of appeal and then continued:] . . . there was sufficient evidence on which the court could find, as it did, that there was a failure to comply with the special condition as charged.

The fifth and last ground of appeal is that:

“The said section i.e., 26 (1) of the Transport Ordinance does not create any absolute offence and the learned magistrate should have held that unless the appellant had allowed expressly the commission of the offence on the, evidence before him no offence was disclosed.”

It is abundantly clear from the evidence that the appellant, the owner of the vehicle and licence-holder, was not on the vehicle at the time the offence was committed, nor is there anything to suggest that he was party to such offence or even knew of it. It is, therefore, submitted by learned counsel for the appellant that no offence has been committed by the appellant, as the section does not impose an absolute liability. In this again, as on the facts, the appellant is supported by learned state attorney, who does not impose an absolute liability. In this again, as on the facts, the appellant is supported by learned state attorney, who does not support the conviction either on the facts or in law.

The point of law raised is far from easy, and, as observed by learned state attorney, there is no authority to the point. He submitted that it would be of great help both to the Bar and to the public to get a ruling on this point.

The question as to whether a specific statutory enactment imposes an absolute liability is far from easy to determine in any particular case. The authorities are not all consistent, nor even always reconcilable. The latest leading case in point, which is of particular importance and relevance to this country, as it is a Privy Council case, is that of *Lim Chin Aik v. R.* (1). In that case the appellant was convicted of entering Singapore after having been declared a prohibited immigrant. It was established in evidence that the appellant was not in fact aware that he had been declared a prohibited immigrant. The Privy Council, reversing the decisions of the lower courts, held that the enactment under which the appellant was convicted did not create an absolute liability, and, quoting the relevant part of the headnote:

“the presumption that mens rea was an essential ingredient of the offence had not been ousted either by the terms of the Singapore Immigration Ordinance, or by its subject-matter.”

Their Lordships in the judgment delivered by Lord Evershed reviewed the relevant authorities, noting the lack of uniformity, remarking:

“As was observed by Wright, J., at the beginning of his judgment in *Sherras v. De Rutzen* (2) to which their Lordships will presently make further reference, the difficulty of the problem is enhanced by the fact that many of the cases are not easy to reconcile. Thus it has been held that a licensee of a public house commits an offence under the licensing legislation of serving alcoholic liquor to a drunken man even though he was unaware of the customer’s condition (*Cundy v. Le Cocq* (3)); but that a licensee does not commit the offence under the same legislation of serving drinks to a police constable on duty if he reasonably supposed that the constable was in fact off duty (see *Sherras v. De Rutzen* (2)); and in the latest case above cited, the Court

of Criminal Appeal held that the terms of s. 1 (1) of the Prevention of Crime Act, 1953, viz.:

“Any person who without lawful authority or reasonable excuse, the proof whereof shall lie on him, has with him in any public place any offensive weapon shall be guilty of an offence . . . “

must be read as if the word ‘knowingly’ were written before the word ‘has’.”

Their Lordships quoted from the judgment of Wright, J., in *Sherras v. De Rutzen* (2) that:

“There is a presumption that mens rea, an evil intention, or a knowledge of the wrongfulness of the act, is an essential ingredient in every offence; but that presumption is liable to be displaced either by the words of the statute creating the offence or by the subject-matter with which it deals, and both must be considered . . .”

The wording of the Ordinance in this instant case is equivocal and in itself capable of being construed as either or not imposing strict liability, though it is very relevant to note that under s. 26 (1) only the licence-holder can be proceeded against, not the driver nor the conductor of the vehicle, who may well be responsible for the offence committed, unless he is also the owner and licence-holder. No assistance can therefore be derived from the wording of the enactment itself. The point at issue therefore falls to be decided under the other head laid down by Wright, J., in *Sherras v. De Rutzen* (2), that is, the subject-matter with which the statutory enactment deals, and this again must be determined by the application of general principles. Their Lordships did, however, formulate certain general principles, which to my mind can be applied to this instant case. They stated ([1963] 1 All E.R. at p. 228):

“Where the subject-matter of the statute is the regulation for the public welfare of a particular activity – statutes regulating the sale of food and drink are to be found among the earliest examples – it can be and frequently has been inferred that the legislature intended that such activities should be carried out under conditions of strict liability. The presumption is that the statute or statutory instrument can be effectively enforced only if those in charge of the relevant activities are made responsible for seeing that they are complied with. When such a presumption is to be inferred, it displaces the ordinary presumption of mens rea. Thus sellers of meat may be made responsible for seeing that the meat is fit for human consumption and it is no answer for them to say that they were not aware that it was polluted. If that were a satisfactory answer, then as Kennedy, L.J., pointed out in *Hobbs v. Winchester Corpn.* (4), the distribution of bad meat (and its far-reaching consequences) would not be effectively prevented. So a publican may be made responsible for observing the condition of his customers: *Cundy v. Le Cocq* (3).”

To my mind, the example of sellers of food for public consumption is particularly apt to this case. Just as in the case of the sellers of food, if they were not subjected to strict liability they could always escape punishment by pleading ignorance and the public would in consequence suffer; likewise in the case of owners of public transport, if they were not subjected to strict liability for the observance of the special conditions attached to the licence, they could escape punishment by pleading ignorance of the breach, and the plea may well be, and often is, true. As already noted, the employee driver or conductor cannot be prosecuted. It would therefore be impossible to enforce the observance of the time-tables laid down, and it is not difficult to envisage how the public would be inconvenienced and suffer in consequence of the failure to observe time-tables. It

may well be argued, as was indeed argued in this instant case, that it would be most unfair to penalise the owner for offences committed by his employees for which he was neither responsible nor had connived at. Here again the answer is to be found in the judgment of the Privy Council, continuing from the passage above quoted.

“But it is not enough in their Lordships’ opinion merely to label the statute as one dealing with a grave social evil and from that to infer that strict liability was intended. It is pertinent also to inquire whether putting the defendant under strict liability will assist in the enforcement of the regulations. That means that there must be something he can do, directly or indirectly, by supervision or inspection, by improvement of his business methods or by exhorting those whom he may be expected to influence or control, which will promote the observance of the regulations. Unless this is so, there is no reason in penalising him, and it cannot be inferred that the legislature imposed strict liability merely in order to find a luckless victim.”

The proprietors of public service vehicles can in a very large measure ensure that special conditions in general, and time-tables in particular, are observed by their employees, in the manner recommended by their Lordships.

I therefore hold, and so rule, that the liability created by the section under which the appellant was convicted is an absolute liability, and it is no defence that the appellant was not a party to or even aware of, the breach of the special condition.

With regard to sentence, in view of the appellant’s record, which the learned magistrate described as bad, the appellant having admitted to seven previous convictions for identical offences, the sentence cannot be regarded as excessive.

The appeal is accordingly dismissed in its entirety.

Appeal dismissed.

For the appellant:

Pirthipal Singh, Tanga

For the respondent:

The Director of Public Prosecutions, Tanganyika

O. T. Hamlyn (State Attorney, Tanganyika)

Coast Brick & Tile Works Ltd and others v Premchand Raichand Ltd and another

[1964] 1 EA 274 (CAN)

Division: Court of Appeal at Nairobi

Date of judgment: 28 April 1964

Case Number: 1/1964 (P.C.).

Before: Sir Trevor Gould VP

Sourced by: LawAfrica

[1] *Privy Council – Practice – Stay of execution – Mortgage suit – Preliminary decree obtained by mortgagee – Whether preliminary decree within Kenya (Procedure in Appeals to Privy Council) Order in Council 1962, s. 6.*

Editor’s Summary

In a mortgage suit the mortgagee had obtained a preliminary decree against the mortgagors and an appeal against that decree had been dismissed by the Court of Appeal. On an application by the mortgagors for stay of execution pending appeal to the Privy Council, it was submitted for the mortgagee that the judgment from which it was intended to appeal to the Privy Council did not fall within s. 6 of the Kenya (Procedure in Appeals to Privy Council) Order in Council 1962, as it did not require the applicants to pay money or do any act.

Held –

- (i) having regard to the object of s 6 of the Kenya (Procedure in Appeals to Privy Council) Order in Council 1962, a preliminary decree in a mortgage suit contains a requirement to pay money which is no less cogent because the alternative to payment is a direct loss of property instead of execution in its technical sense;
- (ii) to carry into effect a preliminary decree for a sale of a mortgaged property is to carry it into execution within the meaning of s. 6, *ibid*; accordingly, for the purposes of stay of execution on an intended appeal to the Privy Council, a preliminary decree falls within s. 6.

Application granted.

Cases referred to in judgment:

- (1) *Mandavia v. Commissioner of Income Tax* (1957), E.A. 1 (C.A.).
- (2) *Cooper v. Nevill* (1959), E.A. 731 (C.A.).

The second respondent did not appear and was not represented.

Judgment

Sir Trevor Gould VP: This is an application for conditional leave to appeal to the Privy Council from a judgment of this court together with an application for a stay of execution pending the proposed appeal. It is common ground that the amount involved is such that the applicants are entitled to conditional leave as of right and I therefore give such leave in terms of paras. 1-8 (inclusive) and para. 10 of the draft order filed by the applicants. The amount of the security for the purpose of para. 1 is fixed at Shs. 10,000/-; the period to be inserted in para. 1 is 60 days. For the purposes of para. 2 the application is to be made within 14 days and the record is to be certified within 90 days; the period to be inserted in paras. 3 and 4 is 90 days and in para. 7, 14 days.

The application for a stay of execution is opposed. The action in question was a mortgage suit brought by the first respondent (hereinafter called “the mortgagee”) against the applicants of whom the first is the mortgagor and the other six are guarantors. For convenience I will refer to them collectively as “the mortgagors”. The mortgaged property comprises 17 acres of land at Mombasa upon which are factory

buildings for the manufacture of bricks and

that I was informed by counsel that the business was still in operation though, due to present economic conditions, there is a lack of market for its products. The mortgagee filed suit on September 21, 1960, and on March 16, 1962, obtained a preliminary decree in relation to the outstanding portion (Shs. 960,000/-) of the principal sum and substantial arrears of interest which was at 12 per cent. per annum. It would appear that the preliminary decree was actually issued on May 17, 1962, and included interest up to May 1, 1962, amounting to Shs. 192,000/-. On July 9, 1962, the Acting Chief Justice ordered a stay of execution pending an appeal to this court, upon condition (inter alia) that interest at 12 per cent. per annum on Shs. 960,000/- from May 1, 1962, to July 31, 1962, be paid into the Supreme Court on or before August 7, 1962, and that further interest at the same rate and on the same amount be paid monthly on or before the 7th day of each month. It would appear that those payments were duly made up to and including January, 1964, but not thereafter.

The preliminary decree above-mentioned was in the usual form. It ordered accounts (which, as I have observed, appear to have been taken before the actual issue of the decree) and decreed that if the amount found due was paid by the mortgagors on or before May 1, 1962, the mortgagee should re-transfer the property mortgaged; that, if the payment was not made by the date specified the mortgaged property should, on application, be sold, and the proceeds be paid to the mortgagee, any balance to a second mortgagee and any final balance to the mortgagors. The mortgagee was at liberty to apply for personal decrees against the mortgagors for any deficiency.

Section 6 of the Kenya (Procedure in Appeals to Privy Council) Order in Council 1962 (which is applicable) reads:

- “6. Where the judgment appealed from requires the appellant to pay money or do any act, the court shall have power, when granting leave to appeal, either to direct that the said judgment shall be carried into execution or that the execution thereof shall be suspended pending the appeal, as to the court shall seem just, and in case the court shall direct the said judgment to be carried into execution the person in whose favour it was given shall, before the execution thereof, enter into good and sufficient security, to the satisfaction of the court, for the due performance of such Order as Her Majesty in Council shall think fit to make thereon

Provided that the court shall have power, in special cases, either to reduce the security to such an amount as to the court may appear just or to dispense with the security.”

By s. 4 of the Kenya Independence Order in Council 1963, s. 6 (supra) must be construed with adaptations necessary to bring it into conformity with the Independence Order and the reference to the Order of Her Majesty in Council must now, I think, be read as a reference to the Order of the Judicial Committee.

Before approaching the merits of the application I will deal with a point of law raised by counsel for the mortgagee. It was his contention that the judgment from which it is intended to bring this further appeal did not fall within s 6, as it did not require the mortgagors to pay money or do any act. He cited *Mandavia v. Commissioner of Income Tax* (1), in which it was held that an order to pay costs is not of itself sufficient to bring the order appealed from within the section; it is the substantive order, or order determining the issues raised in the appeal. That view was endorsed in *Cooper v. Nevill* (2), in which, however, it was held that the court possessed a discretion in the matter out of its inherent jurisdiction.

The argument that the present case does not fall within s. 6 cannot, in my judgment, prevail. *Mandavia's* case is readily distinguishable. The order

there merely confirmed assessments to income tax; the Commissioner could not execute directly on the judgment but would have had to sue for the tax and penalties; the order therefore did not require the taxpayer to pay money or to do any act. Notwithstanding the way in which a preliminary decree in a mortgage suit is framed it goes a long way further than the type of order being considered in *Mandavia's* case (1), and the substance must be looked at. The substance is that the mortgagor is being told that he has up to a certain date to pay the moneys secured and that if he does not, the security will be sold. Such a sanction, I think, imposes a requirement to pay sufficiently within the wording and intent of s. 6. Another way of looking at it is that the mortgagor is being required to do an act, i.e., to redeem the mortgage or lose the security. Weight was given in *Mandavia's* case (1) to the fact that no execution could issue on the order under appeal and I respectfully agree that that was a consideration relevant to the particular order. It is not, however, in my opinion, an exclusive test and, having regard to the object of s. 6, I think the preliminary decree contains a requirement to pay money which is no less cogent because the alternative to payment is a direct loss of property instead of execution in its technical sense. I think also, that the carrying into effect of a preliminary decree for sale of mortgaged property is a carrying into execution within the meaning of the section. I find therefore that s. 6 is applicable and it follows, I think, that neither *Mandavia's* case (1) nor *Cooper's* case (2) is an impediment to my dealing with the question of staying the order for costs as well as the substantive order. Those cases indicate merely that an order for costs alone will not bring a case within the section; once the section applies to a case substantively the court's power to stay extends to the whole of the order under appeal including that for costs; whether, as a matter of practice it will exercise the power in relation to costs is quite another question, to be considered in conjunction with the conditions being imposed. I note only from *Cooper's* case (2) ((1959) E.A. at p. 733) the observation that in each case an application to stay execution must be decided upon its own particular facts.

In the present case the affidavits show that when it agreed to make the original advance (late in 1955) the mortgagee considered the property in question to be worth Shs. 3,000,000/-. By the time the preliminary decree was made, in 1962, there had been a very substantial fall in property values. The affidavit on behalf of the mortgagee is a little inconsistent in that it indicates that immovable properties are not realising more than 25 per cent. of their pre-1960 values (25 per cent. of Shs. 3,000,000/- being Shs. 750,000/-) and at the same time states a belief that the mortgaged property will not realise more than Shs. 300,000/-. The same deponent swore an affidavit containing exactly the same statements in July, 1962, at the earlier stay proceedings, from which it is a reasonable inference that there has been no substantial fall in values since that date. If it is true that a former three million shilling property will now bring only Shs. 300,000/- it is difficult to think that, unless real property is to lose all value, it will fall further. Beyond that inference, I am not justified in making any assumption as to future values.

Generally speaking, a stay of execution on appeal from this court is normally granted only where the subject-matter of the action may be destroyed or irreparable harm may be done. Counsel for the mortgagors submitted in argument that the English cases on which this practice is based do not apply in East Africa because s. 6 requires that if the judgment is to be carried into execution the party in whose favour it was given must give security. That provision does not form any part of the English practice. I agree that this provision must be kept in mind in cases not falling within the proviso to s. 6, but it does not render consideration of such matters as irreparable damage and destruction of subject-matter irrelevant, as has been suggested. Rather to the contrary, because if a

refusal of a stay necessitates the giving of security by the opposite party the applicant would all the more need to show exceptional circumstances if a stay is to be granted.

The decision of this type of case is not easy and every case must be judged on its particular circumstances. If the property is sold and the mortgagors succeeded before the Privy Council they would have lost the chance, which they naturally desire, of getting the benefit of a possible recovery in property values. That increment would go to a third party unless the property had been purchased and retained by the mortgagee. The mortgagee, which, it is common ground, is a company of substance, is willing to give security as provided by s. 6, but I think that course would be likely to result in further, perhaps prolonged, litigation to ascertain the consequential damage to the mortgagors, if they were successful. The mortgagee, if a stay is granted, will not suffer loss of any exceptional character through being kept out of the money. So far as the value of the property is concerned there can be no certainty, but it is likely that the full loss has already been incurred. Payment of interest into court would secure the return on the investment and though the mortgagee could no doubt employ the interest to better advantage if it were not in court a return of 12 per cent. is not inconsiderable.

I think that the circumstances warrant a stay of the preliminary decree (except as to costs) upon proper conditions. Counsel for the mortgagee asked that, if a stay were granted, it should be on condition that all the arrears of interest be brought into court. They amounted to Shs. 192,000/- as at May 1, 1962, and there are the three unpaid instalments of Shs. 9,600/- each in 1964. Such an order would in my view be unduly stringent, though I agree that the order should do something to improve the mortgagee's position.

I do not propose to stay the order for the costs of the appeal to this court, and the costs in the court below, I am informed, have been paid. I order that further proceedings on the preliminary decree be stayed pending the appeal to the Judicial Committee but so long only as the following conditions are observed by the applicants:

- (a) That the applicants pay into this court on or before May 14, 1964, the sum of Shs. 28,600/- representing the three unpaid instalments of interest due under the order of the Acting Chief Justice on February 7, March and April, 1964.
- (b) That the applicants in addition pay into this court monthly on or before the 14th day of each month commencing on May 14, 1964, and continuing until the hearing of the appeal by the Judicial Committee or the order of the Judicial Committee the sum, of Shs. 15,000/- representing current interest of Shs. 9,600/- per month and Shs. 5,400/- per month in reduction of arrears of interest.

There will be liberty to apply to settle the form of order if necessary.

Application granted.

For the appellants:

Velji Devshi & Bakrania, Nairobi

D. N. Khanna and Velji Devshi

For the first respondent:

J. J. and V. M. Patel, Nairobi

J. M. Nazareth, Q.C., and J. J. Patel

For the second respondent:

Krishna Pyari v Surjit Singh
[1964] 1 EA 278 (SCK)

Division: Supreme Court of Kenya at Nairobi
Date of judgment: 30 April 1964
Case Number: 28/1963
Before: Chanan Singh J
Sourced by: LawAfrica

[1] Divorce – Residence by wife – “Ordinarily resident” – Husband employed and resident in Tanganyika – Wife driven from home by husband – Resumption of residence in Kenya – Whether wife “ordinarily resident” in Kenya within Matrimonial Causes Act (Cap. 152) s. 5(1)(K).

Editor’s Summary

In a divorce cause the court ordered that a preliminary issue be tried whether the petitioner had been “ordinarily resident” in Kenya for three years or more. The evidence adduced on this issue was that the petitioner was born in Nairobi and was ordinarily resident there till her marriage with the respondent. Thereafter the petitioner ordinarily resided in Tanganyika, where the respondent was domiciled, until driven out of the house by the respondent when she returned to Nairobi. She had since then resided with her parents in Nairobi till the presentation of the petition more than three years later, during which period the respondent had never asked her to return.

Held – on the evidence the petitioner was “ordinarily resident” in Kenya for three years immediately preceding the commencement of the proceedings, within s. 5 (1) of the Matrimonial Causes Act (Cap. 152).

Order accordingly.

Cases referred to in judgment:

- (1) *Levene v. Inland Revenue Commissioner*, [1928] A.C. 217.
- (2) *Inland Revenue Commissioner v. Lysaght*, [1928] A.C. 234.
- (3) *Malu v. Mutiso*, Kenya Supreme Court Election Petition No. 1 of 1963 (unreported).
- (4) *Lewis v. Lewis*, [1956] 1 All E.R. 375.
- (5) *Stranski v. Stranski*, [1954] 2 All E.R. 536.
- (6) *Hopkins v. Hopkins*, [1950] 2 All E.R. 1035.
- (7) *McCrae v. McCrae*, [1949] 2 All E.R. 34.

Judgment

Chanan Singh J: On July 31, 1963, Mayers, J., ruled on the application of the respondent that the following issue be tried as a preliminary issue before the main trial:

“Had or had not the petitioner on the 10th day of April, 1963, been ordinarily resident within the meaning of section 5 (1) of the Matrimonial Causes Ordinance (Cap. 152) in Kenya for three years or more.”

Section 5 (1) of the Matrimonial Causes Act requires that a wife petitioner shall have been ordinarily resident in Kenya for a period of three years immediately preceding the commencement of the proceedings. This follows s. 18(1)(b) of the Matrimonial Causes Act, 1950, of the United Kingdom, and for this reason English authorities are of help.

The evidence is this. The petitioner was born in Nairobi on June 15, 1936. At the time her family was permanently settled in Kenya. In 1940 her father (now deceased) built a house for the family on Plot No. 209/2489/37 in the area

called the ‘Sikh Colony’ in Nairobi. This is the house in which the petitioner’s mother and other members of the family still live.

The petitioner received her education in Nairobi and she lived in Nairobi, except for brief periods of holiday outside, under her marriage to the respondent on December 8, 1956.

The respondent is a police officer employed by the Tanganyika Government, and he was at the time of the marriage stationed at Arusha. The petitioner joined him in Arusha immediately after marriage. They lived together as husband and wife in Arusha, and later at Usa River. Both these places are in Tanganyika. During her stay with her husband in Tanganyika she visited Nairobi at intervals.

On March 12, 1960, the respondent drove the petitioner out of his house in Arusha and put her in a bus bound for Nairobi. She was, therefore, compelled to return to Nairobi and she came back to her parent’s home on the plot mentioned above. Ever since, she had remained in Nairobi and has lived on the same plot with her mother and other members of the family. She has never gone back to Tanganyika. Her husband, the petitioner says, has never called her back. In these circumstances, the only home she has is in Kenya.

It is quite apparent that the petitioner had “resided” in Nairobi for a little over three years immediately before April 10, 1963. The question, however, is whether she had been “ordinarily resident” in Kenya during this period.

The word “reside” is defined by the Oxford English Dictionary as “to dwell permanently or for a considerable time, to have one’s settled or usual abode, to live in or at a particular place” – quoted in *Levene v. Inland Revenue Commissioner* (1). Lord Cave in the same case states that “ordinary residence”

“connotes residence in a place with some degree of continuity and apart from accidental or temporary absences. So understood the expression differs little in meaning from the word ‘residence’ . . . and I find it difficult to imagine a case in which a man while not resident here is yet ordinarily resident here.”

I think myself the use of the word “ordinarily” in conjunction with the word “resident” reinforces the sense of permanence or makes doubly sure that mere living or residence in one place for a time shall not be regarded as constituting ordinary residence. There must be in the words of Lord Cave himself “some degree of continuity” although “accidental or temporary absences” are to be taken as not interrupting that continuity. Viscount Sumner in *Inland Revenue Commissioner v. Lysaght* (2) contrasts the adverb “ordinarily” with “extraordinarily”, meaning that unless the residence is “extraordinary” it is “ordinary”.

If a person normally lives in Nairobi but goes to Kampala for a week’s holiday he cannot be said to be ordinarily resident in Kampala during that week because he does not ordinarily reside there. Similarly, a young man who has a permanent home in Kenya may go to a foreign country to pursue higher studies. His purpose in the foreign country is a temporary one and he intends to return to his home in Kenya on the completion of his course of studies. His stay in the foreign country cannot be said to be ordinary residence. Here I am describing the normal case. It is not impossible for a Kenya student going overseas for higher studies to interrupt his ordinary residence in Kenya.

In *Malu v. Muliso, Kenya Supreme Court Election Petition No. 1 of 1963* (3), the respondent was absent from Kenya for over seven years for purposes of education in India. He intended to return, and did return, to Kenya on the completion of his course. There were, however, facts which were held by the court to negative ordinary residence in Kenya. In fact, the court (consisting

of Sir John Ainley, C.J., and Mayers, J.), stated: “There was to our way of thinking ‘ordinary residence’ in India” during the respondent’s absence from Kenya. The court was careful to add:

“One thing at least is clear, and that is that the words have no technical or special meaning, and that when considering whether or not residence or ordinary residence exists the court is considering a pure question of fact.”

In the normal divorce case, the court derives its jurisdiction from the domicile of the petitioner. But difficulty arises when a Kenya woman is married to a man with a foreign domicile. Unless the rule regarding domicile is relaxed, a Kenya woman married to a man in another country, as in the instant case, will not be able to petition for divorce in Kenya.

It is to relieve situations like this that the Act in s. 5 (1) gives the wife the right to present a petition after resuming her Kenya residence and continuing it for a period of three years.

One should have thought, however, there would be no difficulty in determining whether or not a set of facts made a person “ordinarily resident”. But the number of cases that have come before courts in England suggests it is not always easy to apply the concept to facts of life.

In the case of *Lewis v. Lewis* (4) the parties were married in England in 1942 and they lived together in a flat in London. The flat was in the wife’s name and was furnished largely by her. In 1951, the husband went to Australia for employment intending to remain there for an indefinite period. The wife followed later and she left her parents in the flat. On September 11, 1951, the wife sailed back from Australia and arrived in England on November 4, 1951. On October 5, 1954, she presented a petition for divorce. It was held on these facts that she had been ordinarily resident in England for the requisite three years which commenced on the day she left Australia. In another case, *Stranski v. Stranski* (5), the husband was a Czechoslovak and the wife a British subject. They married in London in 1944. In October, 1948, the wife acquired and furnished a flat in which she, the husband and their child took up residence. The family moved from country to country in connection with the husband’s employment, but all the time the wife retained the flat which was available for the family’s use any time they came back to London. The flat was so used more than once. On July 28, 1953, the wife filed a petition for divorce in London, and it was found that during the immediately preceding three years she had spent fifteen months in Munich. It was also found that the husband had formed no clear intention of settling in England. It was held that the wife had been ordinarily resident in England for three years.

In these two cases, the deciding factor appears to have been the flat, which was available for use in London.

Hopkins v. Hopkins (6) was a different case because the parties had no physical home in England. They were married in England. The husband went to Canada in 1949 in search of employment. A little later he returned to England and both he and his wife went to Canada. The husband contemplated settling in Canada. On September 22, 1949, the wife returned to England and on October 11, 1949, she filed a petition for divorce. It was held that during the five months that the wife was resident in Canada she was “ordinarily resident” there and that, therefore, she was not ordinarily resident in England during the whole of the three years immediately preceding the commencement of the proceedings.

In the present case, the residence of the petitioner in Tanganyika was certainly ordinary residence. The question is whether her residence in Nairobi on return from Tanganyika can be said to be “ordinary” residence.

This type of difficulty crops up in court cases in connection with the “residence” of females. A girl lives with her parents while she is unmarried. She is ordinarily resident in the place where her parents’ home is. Then, she marries and joins her husband. Her ordinary residence becomes the place where her husband resides. In the case of a breach of relations between the parties, the female may return to her parents’ home. Does her ordinary residence again become her parents’ home? Again, suppose there is a divorce and the woman re-marries and joins her second husband, does her ordinary residence change again?

I do not see any insuperable difficulty here. Somerwell, L.J., in *Macrae v. Macrae* (7) says ([1949] 2 All E.R., at p. 36):

“Ordinary residence . . . can be changed in a day. A man is ordinarily resident in one place up till a particular date. He then cuts the connection he has with that place . . . and makes arrangements to have his home somewhere else. Where there are indications that the place to which he moves is the place which he intends to make his home for, at any rate, an indefinite period, as from that date he is ordinarily resident at that place.”

I have no difficulty on the basis of the evidence before me and the authorities on the subject in finding that the petitioner in the present case was “ordinarily resident” in Kenya for a period of three years immediately preceding the commencement of these proceedings, that is, immediately preceding April 10, 1963, within the meaning of s. 5 (1) of the Matrimonial Causes Act (Cap. 152). I accordingly hold that this court has jurisdiction to try the petition in the present case.

Order accordingly.

For the petitioner:

Satish Gautama, Nairobi

For the respondent:

Khanna & Co., Nairobi

D. N. Khanna

R B Purohit v Indian Building Contractors Ltd [1964] 1 EA 281 (HCU)

Division:	High Court of Uganda at Kampala
Date of judgment:	22 April 1964
Case Number:	101/1964
Before:	Bennett J
Sourced by:	LawAfrica

[1] *Company – Scheme of arrangement – Contingent liability – Action for damages against company pending – Plaintiff in action not given notice of creditors’ meeting – Scheme of arrangement approved –*

Scheme sanctioned by court – Judgment awarding damages given after scheme sanctioned – Whether scheme of arrangement binding upon judgment creditor.

Editor's Summary

In February, 1959, the plaintiff filed an action against the defendant company and another person claiming general damages for breach of a building contract. In November, 1959, a petition was filed for compulsory winding-up of the defendant company and the Official Receiver was appointed provisional liquidator. Subsequently pursuant to an order made by the court under s. 207 of the Companies Ordinance a meeting of creditors was called and the majority of them approved a scheme of arrangement. Although the court had ordered that notice of the meeting should be served on each creditor of the company no notice was sent to the plaintiff because he was not regarded as a creditor and he did not attend the creditors' meeting. The scheme was later sanctioned by the court and the court rescinded the appointment of a provisional liquidator. In February, 1963, judgment was given in the action whereby the defendant

company became liable for Shs. 7,935/- for damages and Shs. 7,075/05 as taxed costs. By agreement of the parties a case was then stated to the court under O. 32 of the Civil Procedure Rules whether the plaintiff was entitled to payment in full of the two sums from the defendant company or whether the plaintiff was bound by the scheme of arrangement sanctioned by the court and thus only entitled to be paid thereunder.

Held –

- (i) by s. 229 (2) of the Companies Ordinance, a winding-up is deemed to commence at the time of presentation of the petition; accordingly although no winding-up order was ever made, the plaintiff was entitled to the benefit of s. 313 of the Companies Ordinance when the meeting of the creditors was held and was entitled to be treated as a creditor of the company at the date of the composition;
- (ii) whether or not the plaintiff was a creditor of the company when a majority of the creditors approved the scheme, he was not bound by it as he had no notice of the meeting and no opportunity to oppose the scheme;
- (iii) the plaintiff was entitled to be paid in full the two sums claimed by him.

Order accordingly.

Cases referred to in judgment:

- (1) *In Re Pen-y-Van Colliery Co.* (1877), 6 Ch.D. 477.
- (2) *In Re Midland Coal, Coke and Iron Company*, [1895] 1 Ch. 267.

Judgment

Bennett J: This is a reference to the High Court by way of case stated under O. 32 of the Civil Procedure Rules. The agreed facts in so far as they are material are these:

On February 16, 1959, one Purohit instituted a suit in the Jinja District Registry (Jinja District Registry Civil Case No. 14 of 1959) against one Dhorajiwalla as first defendant and Indian Building Contractors Ltd. as second defendant, claiming damages for breach of a building contract. On March 4, 1959, the plaint was amended by adding a claim for general damages against Indian Building Contractors Ltd. On November 19, 1959, a petition for compulsory winding up of Indian Building Contractors Ltd. was presented by East African Timber Co-operative Society Ltd., a creditor of the company, and on November 27, 1959, the Official Receiver was appointed provisional liquidator of the company.

On December 8, 1959, Indian Building Contractors Ltd. applied to the court for an order that the company be at liberty to convene a meeting of its unsecured creditors for the purpose of considering a scheme of arrangement whereby the unsecured creditors would be paid a composition of 30 per cent. in full satisfaction of their claims by twelve instalments spread over a three-year period. The application was granted by the court on December 11, 1959, and the court ordered that notice of the meeting together with a copy of the scheme and a form of proxy be sent by post or by hand to each creditor of the company, and that the meeting be advertised in the Uganda Gazette. In accordance with the court's order, notice of the meeting was sent to the creditors of the company and published in the Gazette, but no notice was sent to Purohit because his claim was not admitted. A meeting of creditors was held on January 2,

1960. Purohit did not attend in person or by proxy. At the meeting the scheme was approved by the statutory majority of creditors.

On January 19, 1960, the scheme of arrangement was sanctioned by the court and the order appointing the Official Receiver as provisional liquidator was

rescinded. No one instituted any appeal against the order sanctioning the scheme of arrangement.

On February 14, 1964, Keatinge, J., pronounced judgment in Jinja District Registry Civil Case No. 14 of 1959 assessing damages at Shs. 10,000/- for which Indian Building Contracts Ltd. and their co-defendant were to be jointly and severally liable. He ordered that as between the two defendants, Indian Building Contractors Ltd. should contribute two-thirds of the Shs. 10,000/-, and pay a further sum of Shs. 585/- and costs of the suit. Under the terms of the judgment there was thus a sum of Shs. 7,935/- due by Indian Building Contractors Ltd. to Purohit as damages, and Shs. 7,075/05 as taxed costs.

The question on which the decision of the court is required is whether Purohit is entitled to be paid these two sums in full by Indian Building Contractors Ltd., or whether Purohit is bound by the scheme of arrangement sanctioned by the court and is only entitled to be paid 30 per cent. of his claims.

Counsel for Purohit contended that Purohit was not a creditor of the company until he had obtained judgment on February 14, 1963, and that therefore he is not bound by the scheme. In support of his contention he cited *In Re Pen-y-Van Colliery Co. (1)*, in which it was held that a claim against a company for unliquidated damages on account of alleged fraudulent representation did not constitute the claimant a creditor, so as to entitle him to petition for a winding up order or a supervision order; before he could so petition he must make himself a creditor by changing his claim for damages into a judgment.

Part of Purohit's claim against Indian Building Contractors Ltd. was a claim for unliquidated damages. If he did not become a creditor of the company until he obtained judgment on February 14, 1963, I fail to see how he could be bound by the scheme. The scheme was an arrangement with the company's then creditors and could not affect future creditors or relate to debts which had not then been incurred at the date of the scheme. However that may be, I am inclined to the view that Purohit was a creditor of the company when the scheme of arrangement was approved by reason of s. 313 of the Companies Ordinance, 1958, which states:

"313. In every winding up (subject, in the case of insolvent companies, to the application in accordance with the provisions of this Ordinance of the law of bankruptcy) all debts payable on a contingency, and all claims against the company, present or future, certain or contingent, ascertained or sounding only in damages, shall be admissible to proof against the company, a just estimate being made, so far as possible, of the value of such debts or claims as may be subject to any contingency or sound only in damages, or for some other reason do not bear a certain value."

By s. 229 (2) of the Companies Ordinance, a winding up is deemed to commence at the time of the presentation of the petition for the winding up. This being so I am of opinion that notwithstanding that no winding up order was ever made, Purohit was entitled to the benefit of s. 313 of the Companies Ordinance when the meeting of creditors was held. It is therefore necessary to consider Purohit's rights on the footing that he was a creditor of the company at the date of the composition.

In ordering a meeting of creditors the court was acting under s. 207 of the Companies Ordinance, subss. (1) and (2) of which read:

"(1) Where a compromise or arrangement is proposed between a company and its creditors or any class of them or between the company and its members or any class of them, the court may, on the application of the

company or of any creditor or member of the company, or in the case of a company being wound up, of the liquidator, order a meeting of the creditors or class of creditors, or of the members of the company or class of members, as the case may be, to be summoned in such manner as the court directs.

- (2) If a majority in number representing three-fourths in value of the creditors or class of creditors or members or class of members, as the case may be, present and voting either in person or by proxy at the meeting, agree to any compromise or arrangement, the compromise or arrangement shall, if sanctioned by the court, be binding on all the creditors or the class of creditors, or on the members or class of members, as the case may be, and also on the company or, in the case of a company in the course of being wound up, on the liquidator and contributories of the company.”

The corresponding section of the English Companies Act, 1948, is s. 206. In the commentary on s. 206 in Palmer’s Company Law (20th Edn.), p. 664, the underlying purpose of the section in so far as it relates to creditors is explained thus:

“The value of the section is even more clearly shown when creditors are concerned. Prima facie no creditor can be bound by the agreement of the company with the other creditors or by an agreement between the latter. A compromise approved by a great majority of creditors might be rendered ineffective if a comparatively small creditor were to object and to stand out against it. It is one of the purposes of s. 206 to meet this situation. The effect of a scheme under this section is:

‘to supply by recourse to the procedure thereby prescribed, the absence of that individual agreement by every member of the class to be bound by the scheme which would otherwise be necessary to give it validity’.”

It seems to me plain from this passage and from the words of the section itself that before a majority of creditors can make decisions binding upon a minority, the minority must have an opportunity of being heard and of voicing its objections. I am fortified in this view by *In Re Midland Coal, Coke and Iron Company* (2). In that case Craig was held to be a creditor of the company and to be bound by a scheme of arrangement. In giving the judgment of the court, Lindley, L.J., said:

“We will now consider the effect of the scheme of arrangement. Mr. Craig clearly was entitled to be heard in opposition to that scheme. The cases to which we have referred presuppose the existence of assets not yet distributed amongst the shareholders. Until they are distributed he is entitled to be heard in opposition to any scheme for their distribution.”

If then, Purohit was a creditor within the meaning of s. 207 of the Companies Ordinance when the meeting of creditors was held, he was entitled to be present at the meeting and to voice his assent or dissent to the proposed scheme of arrangement. It will be observed that the court when ordering a meeting of creditors to be held directed that a copy of the scheme and a form of proxy should be sent by post or by hand to *each* creditor of the company. No notice was sent to Purohit because he was not regarded as a creditor. In my judgment he cannot be bound by a scheme of which he had no notice and no opportunity to oppose.

Counsel for Indian Building Contractors Ltd., in support of his argument that Purohit was bound by the scheme, cited the following passage from Palmer’s Company Law (20th Edn.), at p. 672:

“Once the sanction of the court has been given to the scheme, it is binding on all the creditors or the classes of creditors, or on the members or classes of members, who were parties to the scheme, and on the company.”

This passage does not assist Mr. De Silva’s argument, since plainly Purohit was not a party to the scheme.

In my judgment Purohit, whether or not he be regarded as a creditor on the date when the majority of creditors approved the scheme, is not bound by it.

As to the contention that Purohit’s remedy was to appeal against the order of the court sanctioning the scheme, if Purohit was not bound by the scheme he was not aggrieved by it and had no reason to appeal against the order approving it.

I therefore hold that he is entitled to be paid in full the sums which he claims. Indian Building Contractors Ltd. are ordered to pay Purohit’s costs of these proceedings.

Order accordingly.

For the plaintiff:

Hunter & Greig, Kampala

O. J. Keeble

For the defendant:

Wilkinson & Hunt, Kampala

B. E. De Silva

Kubonabona v Director of Public Prosecutions (Busoga Government)

[1964] 1 EA 285 (HCU)

Division:	High Court of Uganda at Kampala
Date of judgment:	8 June 1964
Case Number:	12/1964 (Jinja).
Before:	Udo Udoma CJ
Sourced by:	LawAfrica

[1] Criminal law – Native law and custom – African courts – Charge – Charge of “wounding contrary to customary law as guided by s. 215 (1) of the Penal Code” – Whether African court is thereby administering Penal Code – Relevance of Penal Code in proceedings before African courts.

Editor’s Summary

The appellant was convicted by a district court of “unlawful wounding, contrary to Customary Law as

guided by s. 215 (1) of the Penal Code”. On an application for leave to appeal out of time, which was treated as an appeal, it was submitted for the respondent that on the record the charge appeared to have been laid under s. 215 (1) of the Penal Code, and, if that were so, then the district court had no jurisdiction to try the appellant, since that court could not administer the Penal Code.

Held – the statement in the charge “as guided by s. 215 (1) of the Penal Code” was mere surplusage; as the charge was clearly laid under customary law, it could not be said that the district court was administering the Penal Code.

Appeal dismissed.

Judgment

Udo Udoma CJ: This is an application by the appellant for leave to appeal out of time against his conviction and sentence. The appellant was tried and convicted by the assistant chief judge of the Busoga court sitting at Kaiti.

At the hearing the appellant did not appear, but I informed Mr. Radia, State Attorney, who appeared for the Busoga Government, that the application should be treated as an appeal, which I did; and that he should address whatever submissions he proposed to make in respect of the conviction and sentence of the appellant to the court.

The only point to which counsel for the respondent drew the court's attention was that the charge appears on the record to have been laid under s. 215 (1) of the Penal Code, and, that if that were so, then the court had no jurisdiction to have tried the appellant, since the court could not administer the Penal Code.

The reason for this submission was because on the face of the record the charge as laid was as follows:

“Unlawful wounding, contrary to Customary Law as guided by s. 215 (1) of the Penal Code.”

I have given consideration to this submission, but in my view it has no substance. On the face of the record it is quite clear that the charge was laid under customary law and not under the Penal Code.

In my opinion, African courts are specifically enjoined by law to be guided in their decisions by the provisions of the Penal Code in certain circumstances. This is the main purport of s. 13 of the African Courts Ordinance, which provides as follows:

“13. In all cases where an African court is trying any person for an offence under native law and custom and a similar offence is to be found in the Penal Code, or in any other Ordinance, the court shall so far as certain circumstances permit be guided in its decision by the relevant provisions of the Penal Code or the other Ordinance, as the case may be.”

It is, of course, not strictly correct for the Busoga territory court in framing its charge to state that it is guided by the Penal Code. The intention of the provision of s. 13 is that the African court should be guided, not in the framing of the charge, which, in any case, must be laid under customary law, but in their decisions. In the application of the provision of s. 13, therefore, it is the duty of African courts before which an accused person is tried for an offence contrary to native law and custom, and which offence is also similar to an offence in the Penal Code, to see to it that the element of mens rea requisite to constitute the offence under the Penal Code is established beyond reasonable doubt before convicting such an accused person.

The reason for this provision is quite obvious. It is an excellent device to avoid the possibility of creating two and parallel standards of guilt in respect of the same offence, which is contrary both to native law and custom and to the Penal Code.

It is not, therefore, necessary for an African court in framing its charges to state that it is guided by the appropriate section of the Penal Code. Where an offence with which an accused person is charged under native law and custom and tried in an African court is provided for in the Penal Code or is similar to an offence therein contained, then it is to be presumed that in convicting the accused the court was satisfied that the mens rea prescribed for that offence in the Penal Code has been sufficiently proved by evidence or by inference of law.

I regard the statement “guided by s. 215 of the Penal Code” appearing in the Charge Sheet as mere surplusage, although it is capable of creating the impression that the African court concerned was guided by the Penal Code not necessarily in its decision, but in the framing of the charge. I am not, however, satisfied that the court was thereby administering the Penal Code.

In the interest of all concerned, and for the future guidance of African courts, I think it is right that I should conclude this judgment by directing that this misleading practice of stating in the statement of offence “as guided by the Penal Code” as appearing on the records in the instant appeal be discontinued forthwith.

This direction should be brought to the notice of all African courts and their advisers other than the courts of Buganda.

Subject to the above observations, this appeal is dismissed as lacking in substance. The conviction and sentence are confirmed. The court below to carry out this order.

Appeal dismissed.

The appellant did not appear and was not represented.

For the respondent:

The Director of Public Prosecutions, Uganda

M. P. Radia (State Attorney, Uganda)

Republic v Aloys Kapande [1964] 1 EA 287 (HCT)

Division:	High Court of Tanganyika at Dar-es-Salaam
Date of judgment:	7 February 1964
Case Number:	2/1964
Before:	Sir Ralph Windham CJ
Sourced by:	LawAfrica

[1] *Criminal law – Sentence – Minimum sentence – Theft by public servant – Thefts of Shs. 40/- each on four different dates – Accused convicted on all four counts – Accused sentenced on each count – Whether court entitled to aggregate value of property stolen in each theft – Minimum Sentences Act, 1963, s. 5 (2) (T).*

Editor’s Summary

The accused was convicted on four counts of “theft by a public servant” and was sentenced on each count to three months’ imprisonment, the terms to run consecutively. The thefts were committed by the accused on four different dates and the sum stolen on each occasion was Shs. 40/-. The minimum sentence prescribed by the Minimum Sentences Act, 1963, for each offence was two years’ imprisonment and corporal punishment but the magistrate found that there were “special circumstances” within s. 5(2)(c) of the Act why the minimum sentence prescribed by the Act should not be imposed. The case was

subsequently considered by the High Court on a notice for enhancement of sentence and the point for decision was whether for the purpose of s. 5(2)(b) of the Act the property obtained by the accused should be taken as Shs. 160/-, or as Shs. 40/- only.

Held –

- (i) s. 5(2)(b) of the Minimum Sentences Act, 1963, specifies the value of the property obtained by the offender “in committing the offence”, and not “in committing the offence, or, if he is convicted of more than one offence, in committing both or all such offences”; accordingly the court was not entitled to aggregate the value of the property stolen in each of several thefts charged in separate counts, so as to arrive at a total sum of over Shs. 100/- and thereby deprive the accused of the potential advantages of coming within s. 5(1)(b) of the Act;
- (ii) here was no ground for enhancing sentence.

Order accordingly.

Judgment

Sir Ralph Windham CJ: This case comes before me upon notice for enhancement of sentence. The accused pleaded guilty on four counts to offences of theft by a public servant. The thefts were committed by him in his capacity as a village executive officer employed by the Iringa District Council. They took place in July, August and (twice) October of 1963, and the sum stolen in each case was Shs. 40/-. On conviction the accused, who was 43 years of age, was sentenced on each of the four counts to imprisonment for three months, the terms to run consecutively, the trial magistrate finding that there were “special circumstances”, for the purpose of para. (c) of s. 5 (2) of the Minimum Sentences Act, 1963, why the minimum sentence prescribed for the offence by that Act should not be imposed. These circumstances included the fact that the accused, a married man with children, drew a wage of only Shs. 45/- per month, and learned State Attorney is ready to concede that “special circumstances” did exist. The accused moreover was a first offender, so that para. (a) of s. 5 (2) was also satisfied. The question for decision is whether para. (b) of s. 5 (2) was satisfied; for the case must fall within all three paras. (a), (b) and (c) before less than the prescribed minimum penalty can lawfully be imposed.

The relevant part of sub-para. (i) of para. (b) of s. 5 (2), which is the subparagraph applicable to the present case, lays down that one of the three necessary conditions to imposing less than the minimum penalty, when a person has been convicted of an offence contained in Part I of the Schedule to the Act (which includes theft by a public servant) is where “in cases where property has been obtained by the offender . . . in committing the offence, the value of the property so obtained . . . does not . . . , in the opinion of the court, exceed one hundred shillings”. In the present case the aggregate value of the property obtained by the accused on all four counts, that is to say in all four acts of theft, was Shs. 160/-, although the amount obtained on each count, that is to say in each act of theft, was only Shs. 40/-. The simple point for decision is whether for the purpose of para. (b) the property obtained by the accused is to be taken as Shs. 160/-, or whether it is to be taken as Shs. 40/- only, on the ground that not one of the four separate offences committed by him involved the obtaining of more than Shs. 40/-.

On a straightforward reading of the words of s. 5(2)(b)(i) which I have quoted, it seems to me that there is no justification for the view that the words entitle a court to aggregate the values of property stolen in separate acts of theft charged in separate counts, each of which involved a sum of less than Shs. 100/-, so as to arrive at a total sum of over Shs. 100/- and thereby to deprive an accused of the potential advantages of falling within para. (b)(i). The paragraph speaks of the value of property obtained by the offender “in committing the offence”. It does not say “in committing the offence or, if he is convicted of more than one offence, in committing both or all such offences”. Each of the four acts of theft charged on each of the counts was a separate offence from the others, and was committed on a different date. It cannot, to the prejudice of an accused, be held that for the purpose of the paragraph four offences must be deemed to be one offence, simply because the accused has been charged and tried for them all at one trial. Such may perhaps have been the intention of the draftsman of this Act which is elsewhere so bristling with ambiguities. But I find no such ambiguity in the wording of para. (b)(i) as would justify any speculation on the presumed intention of the legislature. In any event, even if there were such an ambiguity, then since the statute is a penal one it would have to be interpreted in favour of the accused.

It might be argued that, as a logical result of the interpretation that I have placed on para. (b)(i) of s. 5(2) in treating each act of theft as a separate offence, an accused, by reason of having been convicted upon the first count,

would no longer be a “first offender” for the purpose of para. (a) of the subsection when he of convicted on the second count immediately afterwards. But that would be a wholly unwarranted conclusion; nor would it by any means follow as a result of what I have held. For the expression “first offender” is one universally recognised in law as meaning an accused who has never been convicted at any previous trial.

For the foregoing reasons I find no ground for enhancing the penalties imposed by the trial magistrate.
Order accordingly.

For the Republic:

The Director of Public Prosecutions, Tanganyika

M. G. K. Konstam (State Attorney, Tanganyika)

The accused did not appear and was not represented.

Manzi Mengi v R
[1964] 1 EA 289 (CAN)

Division:	Court of Appeal at Nairobi
Date of judgment:	4 June 1964
Case Number:	37/1964
Before:	Sir Samuel Quashie-Idun P, Sir Trevor Gould VP and Sir Daniel Crawshaw JA
Sourced by:	LawAfrica
Appeal from:	The Supreme Court of Kenya – Madan, J.

[1] Criminal law – Murder – Self defence – Burden of proof – Deceased armed with bow and arrows – Threats by deceased to kill accused – Arrow fired by deceased at accused – Accused struck and stabbed by deceased – Retaliation by accused with panga – Whether plea of self defence available.

Editor’s Summary

The appellant found cattle on his shamba being tended by two children who said that the deceased had told them to bring the cattle there. The appellant drove away the cattle and went to fetch a panga to repair the fence. On his return he found the cattle there again and the children told him that they had brought the cattle back on the deceased’s instructions. The appellant again drove away the cattle. While he was repairing the fence the deceased appeared armed with a bow and arrows and after abusing the appellant threatened to kill him. He then fired an arrow at the appellant but missed. The appellant then told the deceased not to kill him and the deceased replied “I am going to kill you”. The deceased then crossed the fence and entered the shamba and struck the appellant twice with the bow and tried to stab the appellant

with the arrows whereupon the appellant struck the deceased repeatedly with the panga as a result of which the deceased died. When charged with murder the defence of the appellant was that he had acted in self defence to save his life. The trial judge found that the appellant stood in danger of his life, that if he had not made use of the panga, the deceased would probably have killed him and that the appellant had acted in self defence but had used excessive force. The judge accordingly convicted the appellant of manslaughter. On appeal,

Held –

- (i) the onus was on the prosecution to show that the appellant was not acting in self defence; it was for the prosecution to show that there was time before the fatal blow was struck for the appellant to have realised that he was out of danger and desisted; this onus was not discharged;
- (ii) the appellant was entitled to use lethal force, and what he did, after he had used it, could not affect his liability on the charge of murder.

Appeal allowed. Conviction and sentence quashed.

Cases referred to in judgment:

- (1) *Selemani v. Republic*, [1963] E.A. 442 (C.A.).
- (2) *R. v. Biggin*, 14 Cr. App. Rep. 87.
- (3) *R. v. Howe*, (1958), 32 Australian Law Journal Reports, 212.
- (4) *Robi v. R.*, [1959] E.A. 660 (C.A.).
- (5) *Chan Kau v. R.*, [1955] A.C. 206; [1956] 1 All E.R. 266.
- (6) *R. v. Lobell*, [1957] 1 All E.R. 734.

Judgment

Sir Trevor Gould VP: read the following judgment of the court:

This appeal was brought from the conviction of the appellant in the Supreme Court of Kenya of the crime of manslaughter. He had been indicted for murder. At the conclusion of the hearing we allowed the appeal, and quashed the conviction and sentence; we now give our reasons.

It was never in dispute that the appellant killed the deceased with a panga, with which he inflicted fourteen wounds. Six wounds were on the head and neck and the skull was fractured; there was a severe wound on each hand, two on the back, and further wounds on the right and left thighs and on each knee. The appellant's defence was that he acted in self defence to save his life and the finding of the learned judge was that he did act in self defence but used excessive force. Nevertheless he acted under provocation which reduced the offence to manslaughter.

The trouble between the appellant and the deceased arose over land. The appellant had permitted one Nzau, a brother of the deceased to cultivate his shamba while he was absent from the district. On his return he wanted the land back and settled the matter amicably with Nzau by paying him Shs. 10/-. The learned judge accepted in its entirety the version of the appellant of the events of the day in question, and the three assessors, who placed the blame wholly on the deceased, obviously did also. The learned judge's findings of fact are contained in the following passage from his judgment:

"I am satisfied there had been a dispute about the accused's shamba of which he had regained the right to possession amicably by paying Shs. 10/- to Nzau. I am also satisfied on the day in question the accused went to his shamba where he found cattle being tended by two children who informed him the deceased had told them to bring the cattle there. The accused also found the fence destroyed. He drove away the cattle and went to fetch a panga to repair the fence. On his return he found the cattle back again in his shamba. The children told him they had brought the cattle back on the deceased's instructions. The accused drove out the cattle again from his shamba and started to repair the fence. When he was doing so the deceased abused him by calling him 'Kino'. I am able to say from my own knowledge that it is a foul and filthy abuse to address to a male African. The abuse was therefore capable of and did constitute provocation. The accused however behaved with restraint and told the deceased that being a Christian, he would not abuse. The deceased who was armed with a bow and arrows said he was going to kill the accused. The deceased's threat as well as the fact of his being armed with a bow and arrows also constituted provocation.

The deceased then told the accused to go away from the shamba otherwise he would kill him. The accused replied, rightly in my opinion, that it was his own shamba. Again the deceased's demand that the accused should leave the shamba coupled with the threat to kill him if he did not comply, also in

my opinion constituted provocation. It was aggravated in association with the recent statements of the children that it was the deceased who had instructed them to bring the cattle to the accused's shamba. Having paid Shs. 10/- the accused had regained the right to re-occupy his own shamba.

The deceased then fired an arrow at the accused but missed. In my view from that moment onwards, if not earlier when the deceased had threatened to kill him, the accused became entitled to defend himself and I believe him when he says he was afraid of the deceased, that he was crying. In court the accused did not strike me as a person who would embellish his case. This is reinforced by his attitude. As the record shows the accused refused to say anything at all in the first instance.

Accused told the deceased not to kill him. The deceased replied 'I am going to kill you'. Again, in my view this also constituted provocation. The deceased then crossed the fence and entered the shamba which provided still further provocation. Up to this moment the accused had not reacted violently. There is however neither any evidence to suppose nor reason to think the accused was not smarting under the provocation being offered to him persistently. In my view the accused must have been feeling terribly provoked.

The deceased then struck the accused twice with his bow. The accused protected himself with the panga. The cut on the bow supports the accused's story. No one came to his help.

The deceased tried to stab him in the chest with his arrows. I believe the accused's statement that when he saw the deceased was going to kill him he raised the panga and cut the deceased with it. I am left in no doubt that the accused acted in self defence when first he began striking the deceased. I accept the accused's story that he cut the deceased because he was afraid if the deceased caught hold of him he would kill him. I consider the conclusion inescapable that there was a moment of time during the struggle when the accused was acting in self defence."

I would tabulate the salient facts so found, as follows:

- (a) the deceased acted offensively in his instruction to the children in connection with the cattle;
- (b) the appellant got his panga for an innocent purpose – to repair the fence;
- (c) the deceased abused the appellant who did not retaliate;
- (d) the deceased threatened to kill the appellant;
- (e) the deceased again threatened to kill the appellant if he did not leave his own shamba and the appellant refused;
- (f) the deceased shot an arrow at the appellant but it missed;
- (g) the deceased again threatened to kill and advanced into the shamba;
- (h) the deceased struck at the appellant twice with his bow and the appellant protected himself with the panga;
- (i) the deceased tried to stab the appellant in the chest with the arrows;
- (j) the appellant then cut the deceased with the panga in order to avoid being killed himself.

In a later passage the learned judge again summarized the matter thus:

"I take into account that in this case there was a series of acts of provocation offered to the accused, that the deceased threatened to kill him if he did not leave and go away from his own shamba, probably the most precious possession in the life of a citizen of Kenya which is no less a castle to an African than a home is to an Englishman, that there was a

murderous attempt to kill the accused when an arrow was fired at him by the deceased who thereafter trespassed on to the accused's shamba and came at him with his bow and struck the accused twice with it and the accused defended himself with the panga, that the deceased tried to stab him in the chest with his arrows each one of which is a lethal weapon as exhibited in court, and, as already stated, I believe the accused when he says he cut the deceased because he was afraid that if the deceased caught hold of him he would kill him, and, above all, the accused did not fetch the panga to enter into a combat with the deceased but he had done so for the purpose of repairing the fence."

There is one further relevant finding in relation to the medical evidence. The learned judge was unable on the evidence to make a finding as to which blow was struck first; all of the wounds were not necessarily fatal. The learned judge went on to say that he was left in no doubt that the appellant stood in danger of his life and that, if he had not made use of the panga, the deceased would probably have killed him.

On all of these findings we find it difficult to conceive a clearer case of killing in self defence, subject only to consideration of the learned judge's finding that excessive force was used. On that question the learned judge did not go into detail but stated that the assessors' view that the appellant acted in self defence was right up to a point but, "I do not think the accused should be acquitted because of the degree of force used by him."

The law to be applied in relation to self defence is the common law of England (see s. 17 of the Penal Code, Cap. 63 of the Laws of Kenya). Dealing with a similar provision in the law of Tanganyika, this court said in *Selemani v. Republic* (1) ([1963] E.A., at p. 446):

"Under English law there is a broad distinction made where questions of self defence arise. If a person against whom a forcible and violent felony is being attempted repels force by force and in so doing kills the attacker the killing is justifiable, provided there was a reasonable necessity for the killing or an honest belief based on reasonable grounds that it was necessary and the violence attempted by or reasonably apprehended from the attacker is really serious. It would appear that in such a case there is no duty in law to retreat, though no doubt questions of opportunity of avoidance of disengagement would be relevant to the question of reasonable necessity for the killing. In other cases of self defence where no violent felony is attempted a person is entitled to use reasonable force against an assault, and if he is reasonably in apprehension of serious injury, provided he does all that he is able in the circumstances, by retreat or otherwise break off the fight or avoid the assault, he may use such force, including deadly force, as is reasonable in the circumstances. In either case if the force used is excessive, but if the other elements of self defence are present there may be a conviction of manslaughter: *R. v. Biggin* (2), *R. v. Howe* (3), *Robi v. R.* (4) (in relation to defence of property)."

The instant case falls into the first of those two categories; there is no doubt that a forcible and violent felony was attempted against the appellant. It was a felony of no minor character but one which, as the learned judge found, was an attempt on his life. Leaving aside the arrow which was actually shot at the appellant there was an attempt to stab him with arrows each one of which, as the learned judge said "is a lethal weapon". Up to that stage, on the findings of the learned judge and assessors, the conduct of the appellant was not blameworthy in any particular. The crime which the deceased was attempting was one punishable by death and, as the matter presents itself to us, if ever there

was a case in which the victim of an attack was justified in using violence, including lethal violence, this is such a case. If we are right in this, it is hard to say how violence which does result in death can be described as excessive in the ordinary sense of that word.

As we have mentioned, the learned judge did not go into detail in finding the violence to be excessive but it seems plain that he had in mind the number of blows struck; he may have been of opinion that the retaliation by the appellant continued after the need for it was past. The concept is expressed in Russell on Crime (11th Edn.), Vol. 1, p. 496, thus:

“It has been observed that as homicide committed in the prevention of forcible and atrocious crimes is justifiable only upon the plea of necessity, it cannot be justified unless the necessity continues up to the time when the party is killed. Thus, though the person upon whom a felonious attack is first made is not obliged to retreat, but may pursue the felon till he finds himself out of danger; yet if the felon is killed after he has been properly secured, and when the apprehension of danger has ceased, such killing will be murder; though perhaps, if the blood were still hot from the contest or pursuit, it has been suggested that it might be held to be only manslaughter on account of the high provocation.”

With respect to the learned judge we find no similarity between the circumstances referred to in that paragraph and the present case. There was no evidence upon which it could have been held that there came a moment in the affray, before any fatal blow had been delivered, when the appellant could have taken thought and realised that all danger to him was past. The learned judge indicated as much in his judgment, when he said:

“But notwithstanding all this, on the evidence I am unable to make a finding which blow was inflicted first. They were not all necessarily fatal. I am left in no doubt that the accused stood in danger of his life and if he had not made use of the panga, the deceased would probably have killed him. It is for this and the further reason which I state later that I cannot regard Dr. Gekonyo’s opinion as being decisive that although he could not say in what order the wounds were inflicted, in his opinion after the head wounds the other wounds could not have been caused by a person who thought he stood in danger of his life.

The same applied in regard to the hand wounds. But it may be that the lesser wounds, few though they were, were inflicted first and the others followed during the struggle in quick succession possibly with the speed of lightning. There is no evidence to enable me to say how long the whole incident took. The further reason is that I am inclined to think Dr. Gekonyo spoke about a sane, rational man in possession of his normal senses and not of a person who had been put in the position of the accused who was suffering from provocation and also feared he would lose his life, a person who was fighting for his life.”

This, in view of the earlier finding that the appellant acted in self defence, amounts to a finding that the learned judge was unable to say that the appellant was not “fighting for his life” throughout the incident. The onus is upon the prosecution to show that the appellant was not acting in self defence (*Chan Kau v. R.* (5), *R. v. Lobell* (6)), and it was therefore upon the prosecution to show that there was a time before a fatal blow was struck that the appellant should have realised he was out of danger and desisted. We emphasise that it must have been before such a blow was struck, for, on our view that the appellant was entitled to use lethal force, what he did after he had used it could not

affect his liability on the charge of murder. That onus was not discharged and the learned judge was unable to make any such finding.

For those reasons in our judgment the learned judge erred in rejecting the plea of self defence and we allowed the appeal.

Appeal allowed. Conviction and sentence quashed.

For the appellant:

C. S. Joshi, Nairobi

For the respondent:

The Attorney-General, Kenya

I. E. Omolo (Crown Counsel, Kenya)

Uganda v Hadi Jamal
[1964] 1 EA 294 (HCU)

Division:	High Court of Uganda at Kampala
Date of judgment:	26 June 1964
Case Number:	9/1964
Before:	Udo Udoma CJ
Sourced by:	LawAfrica

[1] *Criminal law – Revision – Powers of court in revision – Criminal Procedure Code (Cap. 24) s. 318 (1)(b), s. 341 (1) (U.).*

[2] *Criminal law – Sentence – Caution administered by court – Whether caution is a sentence.*

[3] *Criminal law – Charge – Irregularity – Particulars of offence inconsistent with charge – Whether charge as laid discloses any offence – Criminal Procedure Code (Cap. 24) s. 347 (U.) – Traffic Regulations, 1951, s. 18 (7) and s. 30 (U.).*

[4] *Criminal law – Plea – Charge inconsistent with particulars of offence – Plea of guilty – Accused not represented by counsel – Whether accused intended to admit facts in particulars of offence – Whether accused duly tried.*

Editor's Summary

The accused was charged with an offence under r. 18 (7) of the Traffic Regulations, 1951 which prohibits or restricts the use of a spotlight on a motor vehicle. The particulars alleged that the accused being the owner of a motor vehicle had permitted its use without rear red reflectors. At the trial the

accused admitted the charge and was convicted and cautioned under s. 318(1)(b) of the Criminal Procedure Code. After recording the conviction the magistrate added “The reflectors were covered with mud. Now they are all right”. On an application in revision for enhancement of sentence on the ground that administration of a caution was so inadequate as to involve a miscarriage of justice, it was submitted that the caution administered must be treated as a sentence for the purpose of s. 341(1)(a) of the Criminal Procedure Code.

Held –

- (i) a caution is technically a sentence since it is an order made in consequence of a conviction;
- (ii) by virtue of s. 341(1)(a) of the Criminal Procedure Code, the High Court of Uganda is empowered in revision, in the case of a conviction, to exercise all the powers conferred by s. 331 of the Code, and for the purpose of this application it was competent for the court under s. 331(2)(ii) with or without altering the finding of the magistrate to increase the sentence;
- (iii) the charge as laid was manifestly wrong and did not disclose any offence having regard to the particulars set out in the said charge; accordingly grave injustice would result if the court were to invoke s. 347 of the Criminal Procedure Code to cure the defective charge;

- (iv) in view of the words presumably uttered by the accused that the reflectors were covered by mud, the accused did not intend to admit the facts as set out in the particulars of the charge when he pleaded guilty thereto and accordingly the magistrate was not entitled to enter a plea of guilty;
- (v) there was no trial properly so called and therefore no sentence which could be enhanced.

Application refused.

Cases referred to in judgment:

- (1) *Nathan Godfrey Odhiambo Obiero v. R.*, [1962] E.A. 650 (K).
- (2) *Juma Shabani Keshallilla v. Republic*, [1963] E.A. 184 (C.A.).
- (3) *R. v. Harman*, [1959] 2 All E.R. 738; 34 Cr. App. R. 161.

Judgment

Udo Udoma CJ: In this case the accused (hereinafter to be referred to as the respondent) was charged under ss. 18 (7) and 30 of the Traffic Regulations, 1951, the charge being in the terms hereunder set forth:

“Statement of Offence

No Rear Red Reflectors, contrary to Regulations 18 (7) and 30 of the Traffic Regulations, 1951.

Particulars of Offence

Hadi Jamal, on 31st August, 1963, at about 2000 hours at Jinja, Bugembe Trading Centre, being the owner of motor vehicle registered number, UEG 499, permitted its use on the road when there was not fixed thereto at the rear thereof two reflectors reflecting a red light and so placed as to indicate the presence and approximate width of the vehicle.

At the trial, the record of proceedings reads as hereunder appearing:

“2.1.64. Accused appears.

Charged.

Admits the charge. Convicted as charged.

The reflectors were covered with mud. Now they are all right.

Cautioned.”

The Director of Public Prosecutions (hereinafter to be referred to as the applicant) now applies for an order of this court in revision under s. 341 of the Criminal Procedure Code altering the order made by the learned trial magistrate by which he had cautioned the accused and thereby to enhance the sentence. The ground for this application is that:

“the administration of a caution to Hadi Jamal for permitting the use of a motor vehicle on the road without rear reflectors, contrary to Regulation 18 (7) of the Traffic Regulations, 1951, is so inadequate as to involve a miscarriage of justice.”

In the course of the hearing of this application, the arguments addressed by both counsel to this court raise three questions of some importance for determination, namely:

- (i) whether a caution under s. 318(1)(b) of the Criminal Procedure Code can properly be described as a

sentence within the terms of ss. 341(1)(a) and 331(2)(ii) and (iii) of the Criminal Procedure Code;

- (ii) whether the charge as laid under Regulation 18(7) discloses any offence having regard to the particulars set out in the said charge;

- (iii) whether in view of the explanation appearing on the record, namely, that the reflectors of the car were merely covered with mud, the respondent had intended to admit the facts set out in the charge when he pleaded thereto.

As regards the first question counsel for the applicant, submitted that the learned trial magistrate in cautioning the respondent was exercising the powers conferred upon the court under s. 318(1)(b) of the Criminal Procedure Code, for after having convicted the respondent, the learned trial magistrate had proceeded to “sentence” him to a caution in terms of s. 318(1)(b) of the Criminal Procedure Code. Therefore, according to counsel for the applicant, the caution administered to the respondent must be treated as a sentence. In support of this contention, counsel cited and relied upon a Kenya case, *Nathan Godfrey Odhiambo Obiero v. R.* (1); as also upon the decision of the East African Court of Appeal in *Juma Shabani Keshallilla v. Republic* (2), which he contended would afford an analogy applicable to the instant case.

I do not think that the decision in *Juma Shabani Keshallilla* (2) is particularly pertinent to the circumstances of the instant case. It cannot afford the court any assistance in determining the questions now in issue. What was dealt with in that case was not as to the meaning of a caution but only as to the powers of a court under s. 329 of the Tanganyika Criminal Procedure Code in relation to an order for security made under s. 305 of the Tanganyika Criminal Procedure Code. The provisions of s. 329 of the Tanganyika Criminal Procedure Code are of course similar to the provisions of s. 341 of the Criminal Procedure Code of Uganda. As was held in that case, although a sentence is an order of a court, an order for a recognisance under s. 305 of the Tanganyika Criminal Procedure Code does not amount to a sentence, and therefore cannot be enhanced by the court on a revision.

Nathan Godfrey Odhiambo Obiero v. R. (1) in which the provisions of s. 35 of the Kenya Penal Code and ss. 364 and 354 of the Kenya Criminal Procedure Code were considered, appears, on the other hand, to afford this court a better analogy. The circumstances present in that case and the question therein considered are certainly similar and relevant to those under consideration in the instant case. The provisions of ss. 364 and 354 of the Kenya Criminal Procedure Code are to some considerable extent similar to the provisions of ss. 341 and 331 respectively of the Uganda Criminal Procedure Code.

In *Nathan Godfrey Odhiambo Obiero v. R.* (1), an accused person was convicted by a Kenya magistrate of forgery and uttering under ss. 352 and 356 of the Kenya Penal Code. He was given an absolute discharge under s. 35 of the Kenya Penal Code. The Supreme Court of Kenya, with a view to enhancing the sentence, called for the proceedings under s. 364 of the Kenya Criminal Procedure Code on the ground that the order of absolute discharge was too lenient.

For the accused in that case, it was contended before the Supreme Court that the order of absolute discharge under s. 35 of the Penal Code was not a sentence and that there was no power on revision to set aside such an order or to substitute for it any other order in the nature of an enhanced sentence. The Supreme Court, however, overruled that contention and held that an order of absolute discharge under s. 35 of Kenya Penal Code was technically a sentence since it followed upon a conviction, and that it was competent for the court to enhance it on revision.

It should be noted, however, that what the court had to consider in that case was an order of absolute discharge and not an order of a caution. A caution would appear to be a more severe order than an order of absolute discharge; and a caution, being any warning, as defined in Wharton’s Law Lexicon (14th

edn.) at p. 169, may be considered in the sense of an admonition in contradistinction to an absolute discharge, which in effect is an order setting a convicted person unconditionally free.

Unfortunately, the word “sentence” has not been defined either by the Penal Code or the Criminal Procedure Code of Uganda. But it may be of interest, and indeed, instructive to refer to the definition of “sentence” as contained in an English statute, although since the statute is not of a general application this court is not necessarily to be bound by that definition.

In s. 21 of the Criminal Appeal Act, 1907 (see Archbold’s Criminal Pleadings, Evidence and Practice (35th edn.) at p. 348) we find the following definition:

“The expression ‘sentence’ includes any order of the court made on conviction with reference to the person convicted or his wife or children, and any recommendation of the court as to the making of an expulsion order in the case of a person convicted. . . .”

And in *R. v. Harman* (3), it was held that the phrase “any order of the court made on conviction” means any order made as a consequence of conviction and does not include a sentence of imprisonment for non-payment of estreated recognisance.

In the instant case, the order of a caution was made by the court in consequence of the conviction of the respondent in the exercise of its powers under s. 318(1)(b) of the Criminal Procedure Code, the relevant provisions of which are as follows:

“Where, in any trial before a court, the court thinks that the charge against the accused person is proved but is of opinion that, having regard to the character, antecedents, age, health or mental condition of the accused, or to the trivial nature of the offence, or to the extenuating circumstances in which the offence was committed, it is inexpedient to inflict punishment, the court may:

- (a) without proceeding to conviction, make an order dismissing the charge; or
- (b) convict the accused person and caution him.”

Thus under the above provisions two alternative courses were open to the learned magistrate. He could either dismiss the charge without proceeding to a conviction; or proceed to a conviction and then caution the respondent. Therefore having proceeded to a conviction, he was bound to caution the convicted person. The learned trial magistrate considering it inexpedient to inflict punishment on the respondent, had chosen to convict him on his own plea of guilty and then to caution him, which clearly shows that the magistrate had acted under s. 318(1)(b) of the Criminal Procedure Code.

It would appear that the word “caution” is here used in contrast with the term punishment; but nevertheless, it is a milder form of penalty. Punishment would, of course, imply a fine or imprisonment or any other form of punitive imposition.

I am inclined to the view that a caution is technically a sentence since it is an order made in consequence of a conviction for, under s. 283(3) of the Criminal Procedure Code it is provided:

“If the accused person is convicted, the judge shall pass sentence on him according to law”;

and, the sentence prescribed by law in the instant case is a caution following as it does upon a conviction.

It is true, of course, that the provision of s. 283 (3) of the Criminal Procedure Code makes specific reference to a judge, but I think that it is equally applicable to a magistrate. For in a suitable case a judge may also, on the conviction of an accused person, caution him in terms of s. 318(1)(b) of the Criminal Procedure Code.

The relevant powers of the court on revision in Uganda are to be found in s. 341(1)(a) and (b) of the Criminal Procedure Code the provisions of which are in the following terms:

- “341 (1) In the case of any proceedings in a subordinate court the record of which has been called for or which has been reported for orders, or which otherwise comes to its knowledge, when it appears that in such proceedings an error material to the merits of any case or involving a miscarriage of justice has occurred, the High Court may:
- (a) in the case of a conviction, exercise any of the powers conferred on it as a court of appeal by sections 331 and 334 of this Code and may enhance the sentence;
 - (b) in the case of any other order, other than an order of acquittal, alter or reverse such order.”

And for the purpose of the question under consideration, only s. 331 (1) and (2) of the Criminal Procedure Code referred to in s. 341(1)(a) is relevant, the provisions of which are as set out hereunder:

- “331 (1) The High Court on any appeal against conviction, shall allow the appeal if it thinks that the judgment should be set aside on the ground that it is unreasonable or cannot be supported having regard to the evidence or that it should be set aside on the ground of a wrong decision on any question of law if such decision has in fact caused a miscarriage of justice, or any other ground if the court is satisfied that there has been a miscarriage of justice, and in any other case shall dismiss the appeal:

Provided that the court shall, notwithstanding that it is of the opinion that the point raised in the appeal might be decided in favour of the appellant, dismiss the appeal if it considers no substantial miscarriage of justice has actually occurred.

- (2) Subject to the provisions of subsection (1) of this section, the High Court on any appeal may:
- (i) reverse the finding and sentence, and acquit or discharge the appellant, or order him to be tried or retried by a court of competent jurisdiction; or
 - (ii) alter the finding and find the appellant guilty of another offence, maintaining the sentence, or with or without altering the finding, reduce or increase the sentence; or
 - (iii) with or without such reduction or increase and with or without altering the finding, alter the nature of the sentence.”

Thus it is clear, and I am therefore of the opinion, that by virtue of s. 341(1)(a) of the Criminal Procedure Code this court, on a revision, is empowered in the case of a conviction to exercise all the powers conferred upon it by s. 331 of the Criminal Procedure Code, the relevant provisions thereof for the purpose of the instant application being sub-s. 2(ii) and (iii). In other words, on a revision it is competent for this court under s. 331(2)(ii) with or without altering the finding of the trial magistrate to increase the sentence. That construction, I am satisfied, is in consonance or consistent with the provisions of s. 341(1)(a),

which itself empowers the court to enhance such sentence. Under s. 331(2)(iii) the court has the power to alter the very nature of such a sentence.

I turn now to consider the next question, which is, whether the charge as laid under reg. 18 (7) discloses any offence having regard to the particulars set out in the said charge.

It was submitted for the applicant that even though the charge was laid wrongly under s. 18 (7) of the Traffic Regulations because it should have been laid under s. 18 (8) of the Regulations, the respondent was not in any way misled since the particulars of the charge were read over to him before he pleaded thereto. The court should therefore hold that no failure of justice has been occasioned in terms of s. 347 of the Criminal Procedure Code, since having regard to the proviso to that section, the objection could have been raised at an earlier stage.

Counsel for the respondent contended that the charge as laid was defective. He, however, agreed that it was competent for the court under s. 347 of the Criminal Procedure Code to uphold the conviction of the respondent.

Now the charge against the respondent was that:

“he being the owner of a motor vehicle No. UEG 499 permitted its use on the road when there were not fixed thereto at the rear thereof two reflectors reflecting red light and so placed as to indicate the presence and approximate width of the vehicle.”

The charge was laid under reg. 18 (7) of the Traffic Regulations, 1951, the provisions of which read as follows:

“18(7) No spotlight or swivelling light shall be used:

- (a) in a municipality or township;
- (b) in place of headlights, save where an accident has occurred;
- (c) in such a manner as to impede the vision of or cause annoyance to any user of the road;
- (d) as a moveable or swivelling light while the motor vehicle to which it is applied is in motion.”

From the above, it cannot be said that by any stretch of the imagination the particulars of the charge as laid, which deal with the absence of two reflectors reflecting the red light at the rear of the motor vehicle, fall within the purview of the provisions of reg. 18 (7) which prohibit the use of spotlight or swivelling light in certain circumstances. Yet the court is asked to hold that the error on the face of the charge, had not, in fact, occasioned a failure of justice. It is impossible for this court to accept such a proposition.

It must be remembered that the respondent was not represented by counsel at the trial and therefore no question of failure to have raised any objection to the charge could arise. It was the duty of the prosecution, in the first place, to see that the charge was correctly framed and that it was laid under the appropriate section of the Regulation. Equally was it the special duty of the trial magistrate to make certain, having regard to the fact that the respondent was not represented by counsel, that the charge was laid under the correct section of the Regulations before convicting him on his own plea of guilty.

That, in my view, ought to be the position. To hold otherwise would be to encourage incompetence and recklessness, which may result in the unsatisfactory situation in which the prosecution might be inclined always to pay little or no attention to the correctness of the charge brought before a court in the hope and belief that in the event of an appeal, the Appeal Court would always resort to the expedient of the provisions of s. 347 of the Criminal Procedure Code for

the purpose of upholding a conviction. I am inclined to the view that this is not a suitable case in which to invoke that section of the Criminal Procedure Code.

I hold that the charge is so manifestly wrong that grave injustice would result were I to uphold the conviction, having regard to the charge as laid, and also having regard to the view which I take of the last and final question, which is, whether in view of the explanation that the reflectors were merely covered with mud, the respondent had intended to admit the facts disclosed in the particulars, when he pleaded thereto.

Looking at the record of proceedings, brief and unhelpful as it is, underneath the words “convicted as charged”, there are to be found the following words:

“The reflectors were covered with mud. Now they are all right.”

It is not clear who it was who had uttered those words. Counsel for the applicant, says it must have been said by the respondent, whereas counsel for the respondent’s contention is that they were spoken by the prosecution. Whoever had uttered those words, in my view, the practical result would be just the same.

I think, however, that having regard to the particulars disclosed in the charge as laid, it would have been inconsistent for the prosecution to have offered the explanation that the reflectors were only covered with mud, the charge being that there were no reflectors at all at the rear of the vehicle. It is right to assume for the benefit of the respondent that the statement was made by him under allocutus. In which case it would amount to a plea of not guilty, which ought to have been taken cognisance of by the trial magistrate.

In the circumstances, I have come to the conclusion that the respondent did not intend to admit the facts set out in the particulars of the charge when he pleaded guilty thereto. There was, therefore, no trial properly so called, and no sentence which can be enhanced by this court. This application is therefore refused.

Application refused.

For the applicant:

The Director of Public Prosecutions, Uganda

M. P. Radia (State Attorney)

For the applicant:

Patel & Dave, Kampala

R. S. Dave

Oforo Makupa v Republic
[1964] 1 EA 301 (HCT)

Division: High Court of Tanganyika at Arusha

Date of judgment: 17 January 1964

Case Number: 422/1963 (Arusha).

Before: Murphy J
Sourced by: LawAfrica

[1] Criminal law – Trial – Inquest – Order by magistrate acting as coroner that criminal proceedings be instituted – Criminal case heard by same magistrate – Propriety of magistrate hearing case.

Editor's Summary

The appellant was the driver of a vehicle which was involved in an accident which caused the death of one of the passengers. At an inquest the magistrate in his capacity of coroner, after recording the depositions of a police inspector who investigated the accident and an identifying witness, ordered that the driver of the vehicle should be charged and that proceedings should be stayed. The appellant was duly charged before the same magistrate and convicted by him of dangerous driving. On appeal it was submitted that the magistrate had directed the prosecution and that, since it appeared that he had come to a conclusion on some aspects of the evidence before the trial commenced, he should not have heard and determined the case. On appeal,

Held –

- (i) at the inquest the magistrate, after hearing the evidence of the investigating officer, was of the opinion that sufficient grounds had been disclosed for instituting criminal proceedings but he did not decide that a criminal offence had been committed; accordingly the magistrate was not debarred from trying the case on the principle that justice must be seen to be done;
- (ii) when a magistrate acting as coroner has made an order under s. 22 (1) of the Inquests Ordinance, the subsequent criminal proceedings should, if practicable, be heard by another magistrate.

Appeal dismissed.

Judgment

Murphy J: The appellant was convicted of dangerous driving and was sentenced to pay a fine of Shs. 500/-, and to be disqualified from driving for six months. He appeals against conviction and sentence.

The appellant was driving his car at night along a street in Moshi. He swerved to avoid some pedestrians, went off the road and hit a house. One of his passengers was killed.

The first three grounds of appeal refer solely to the learned trial magistrate's findings of fact. These grounds have no merit. The learned magistrate considered the evidence in a careful judgment and it is impossible to say that he attached undue weight to matters which were in the appellant's disfavour. In conclusion he said that on any view the appellant must have been driving in a dangerous manner and the reasons which he gave for this finding are, in my opinion, unanswerable.

The only matter which has caused me some concern is that raised in the fourth ground of appeal. The learned magistrate had previously, in his capacity of coroner, presided over an inquest into the death of the passenger who was killed. After recording the depositions of the police inspector who investigated the accident and of an identifying witness, he ordered: "The driver of the vehicle to be charged. Proceedings stayed under s. 22 of the Inquests Ordinance."

It is now submitted that he thereby directed the prosecution and that, since it appeared that he had come to a conclusion on some aspects of the evidence before the trial commenced, he should not have heard and determined the case.

Section 22 (1) of the Inquests Ordinance (Cap. 24) provides:

“If in the course of an inquest, the coroner is of opinion that sufficient grounds have been disclosed for instituting criminal proceedings in connection with the death against any person already in custody or whose arrest is contemplated, the coroner shall stay the inquest until the trial of the person to be charged is concluded or he is discharged by a subordinate court under section 86 (a) or section 225 of the Criminal Procedure Code or it appears improbable that such person will be found.”

It is perhaps going too far to say that a coroner who makes an order under this subsection is “directing a prosecution” since the subsequent proceedings may well be concluded by a withdrawal of the charge or by the entry of a nolle prosequi. In the present case the position was simply that, after hearing the evidence of the investigating officer (the evidence of the other witness being irrelevant to this question), the learned magistrate was of the opinion that sufficient grounds had been disclosed for instituting criminal proceedings. The question then is whether the principle that justice must be seen to be done debarred him from trying the case. At the hearing of the appeal learned counsel were not able to refer me to any authority on this point and I have not been able to find one. After careful consideration I have decided that the submission made on behalf of the appellant must fail. To form an opinion, after hearing the evidence of one witness, that criminal proceedings should be instituted is very far from deciding that a criminal offence has been committed. At the same time, I think that when a magistrate in his capacity of coroner has made an order under s. 22 (1) of the Inquests Ordinance, it is desirable that the subsequent criminal proceedings should be heard by another magistrate, so long as that is practicable.

The fifth and last ground of appeal relates to the sentence, which cannot in my view be said to be excessive. The record shows that the learned magistrate took into account the matters urged in mitigation, namely that the appellant was a first offender and that he had suffered financial loss and disablement in consequence of the accident.

The appeal is dismissed.

Appeal dismissed.

For the appellant:

O’Connor & Co., Arusha

M. Behal

For the respondent:

The Director of Public Prosecutions, Tanganyika

N. D. Macleod (State Attorney, Tanganyika)

Kantilal Devraj Shah v Principal Registrar of Titles
[1964] 1 EA 303 (SCK)

Division: Supreme Court of Kenya at Nairobi

Date of judgment: 30 June 1964

Case Number: 8/1964

Before: Rudd J

Sourced by: LawAfrica

[1] Land registration – Conveyance – Registration – Sale by mortgagees – Sale without intervention of court – Power of sale conditional upon attestation of mortgage by advocate – Conveyance to purchaser executed by mortgagees – Registration of conveyance refused – Allegations of fraud and irregular execution of mortgage made by mortgagor – No enquiry made into allegations by registrar – Whether purchaser entitled to registration of conveyance.

Editor's Summary

A mortgage registered under the Crown Lands Act purported to have been signed sealed and delivered by the mortgagor in the presence of her husband and an advocate and bore a certificate signed by the advocate that he had explained to her the effect of s. 13 (1) of the Indian Transfer of Property Act (Amendment) Ordinance, 1959, and that he was satisfied that she understood the same. The mortgaged property was sold by auction by the mortgagees under the powers conferred by the mortgage without the intervention of the court and the property was purchased by the appellant. A conveyance to the appellant was executed by the mortgagees in exercise of their powers of sale under s. 69 of the Indian Transfer of Property Act, 1882. The conveyance was then submitted for registration but the Registrar of Titles, relying on a statutory declaration made by the mortgagor and served on the Registrar and on s. 109 of the Crown Lands Act, refused to register it. The declaration alleged that the mortgagor had thumbprinted the mortgage in the presence of her husband only; that the mortgagor had never met or seen the advocate and that the purported sale of the property constituted on the part of the mortgagees fraudulent and improper dealing with the property to defeat her claims in a suit filed by her and still pending for a declaration that the mortgage was invalid. The Registrar did not call for a reply to or enquire into the truth of the allegations in the statutory declaration and his reasons for refusing registration were, inter alia, that the statutory declaration led him to believe that a fraud upon the mortgagor had been committed since the mortgage purported to show that the mortgagor's signature had been properly attested by the advocate. The appellant appealed against the refusal to register the conveyance.

Held –

- (i) under s. 99 of the Crown Lands Act the conveyance to the appellant was a transaction conferring or purporting to confer on the appellant a right, title or interest in land registered under Part X of the Act; it was also a transaction which purported to extinguish the mortgagor's rights in the land and also the mortgagees' rights under the registered instrument purporting to be a mortgage; the conveyance was therefore registerable subject to any other provisions to the contrary in the Act;
- (ii) the Registrar of Titles was not entitled to go behind the documents registered in the appropriate folios of the register nor was he justified in refusing to register the conveyance on the ground that fraud might have been committed in relation to the registered mortgage;
- (iii) the conveyance to the appellant was in order on the basis of the documents registered and there was nothing to indicate that the appellant did not obtain the transfer in good faith.

Appeal allowed.

Judgment

Rudd J: The matters in issue in the present appeal arose as follows: A married woman by name Kishen Kaur being seized in possession in fee simple of certain lands by virtue of a conveyance to her which was duly registered under Crown Lands Act purported to execute an instrument whereby she mortgaged the said lands to two people whom I shall call the mortgagees to secure an advance of money to her by the mortgagees. Her husband was a party to the said instrument whereby he made himself personally responsible as an additional surety for the payment of the said advance.

This instrument was dated October 16, 1959, and was registered under the Crown Lands Act on October 17, 1959. It purported to have been signed sealed and delivered by Kishen Kaur in the presence of her husband and of one Jagdish Desai, an advocate, and it bore a certificate signed by the said advocate that he had explained the effect of sub-s. (1) of s. 13 of the Indian Transfer of Property Act (Amendment) being Ordinance No. 9 of 1959 and that the said advocate was satisfied that the said mortgagor understood the same. The instrument itself contained provisions which read as follows:

- (vii) *THAT* the mortgagees or any person acting on their behalf shall by virtue of the Indian Transfer of Property Act (Amendment) Ordinance No. 9 of 1959 and without the intervention of the court have power when the said sum of Shillings Twenty-five thousand (Shs. 25,000/-) has become due to sell, or to concur with any other person in selling the property hereby assigned or any part thereof by public auction or by private contract subject to such conditions respecting title or evidence of title or other matter as the mortgagees think fit with power to vary any contract for sale and to re-sell without being answerable for the loss occasioned thereto.
- (viii) *THAT* the mortgagees' said Statutory power of sale shall include all those powers as incident thereto which are enumerated under s. 13 of the Indian Transfer of Property Act (Amendment) Ordinance No. 9 of 1959 and not specifically herein recited.
- (ix) *THAT* the mortgagees shall not be answerable for any involuntary loss happening in or about the exercise or execution of any power conferred on them by these presents or by statute or of any trust connected therewith.

Under the Indian Transfer of Property Act as applied to Kenya there was before the passing of Ordinance No. 9 of 1959 no statutory power of sale without the intervention of the court and indeed the Act was framed in terms which prohibited an effective contractual power of sale without the intervention of the court under a mortgage which was executed before the passing of the Ordinance except in certain special cases which do not apply.

The effect of the Ordinance was to amend the Act so as to take away the bar to an effective contractual power of sale and to provide a statutory power of sale by a mortgagee under an English mortgage as defined in the Act, but the amendment only applied *inter alia* if the mortgagor's signature to the mortgage instrument has been witnessed by an advocate and if the said instrument bears a certificate signed by that advocate to the effect that he has explained to the mortgagor the effect of sub-s. (1) of the amendment and that he was satisfied that the mortgagor understood the same.

Under s. 59 of the Transfer of Property Act whereas in this case the principal money secured is one hundred rupees or upwards a mortgage can be effected only by a registered instrument signed by the mortgagor and attested by at least two witnesses.

On March 27, 1962, Kishen Kaur instituted a suit against “mortgagees” wherein she pleaded that she had thumbprinted the instrument of mortgage in the presence of her husband only; that the advocate Jagdish Desai was not present thereat and that she had never met or seen the said advocate. She claimed a declaration that the said instrument did not create a mortgage.

On July 16, 1962, Kishen Kaur obtained an order of injunction prohibiting the “mortgagees” from selling the land by public auction or otherwise disposing of or alienating it until further order of the court so long as Kishen Kaur conformed to certain conditions therein stated.

On January 23, 1964, on application by the “mortgagees” the injunction was discharged because Kishen Kaur had defaulted in the performance of the conditions imposed upon her and it was ordered that the costs of the application to discharge the injunction be taxed forthwith and paid to the mortgagees by Kishen Kaur before the further hearing of the case. The costs have not been paid.

The mortgagees then purporting to exercise their power of sale under the instrument of mortgage caused the property to be sold by public auction and the appellant became the purchaser. On or about March 4, 1964, a conveyance prepared and presented by the advocate Jagdish Desai was submitted for registration. It was executed by the mortgagees in favour of the appellant in exercise of the mortgagee’s statutory power of sale under s. 69 of the Indian Transfer of Property Act which incorporates the amendment made by Ordinance 9 of 1959.

On March 10, 1964, the Registrar was served with a statutory declaration made by Kishen Kaur wherein she made declarations repeating the allegations which she had pleaded in her suit against the mortgagees.

On the strength of this statutory declaration the Registrar refused to register the conveyance from the mortgagees to the appellant. The Registrar’s reasons for refusing to register this conveyance were that the statutory declaration led him to believe that a fraud had been committed to the prejudice of Kishen Kaur in so far as the mortgage deed purported to show that her signature had been properly attested by an advocate J. R. Desai whom he believed was acting for the mortgagees; without J. R. Desai’s attestation of Mrs. Kishen Kaur’s signature to the mortgage her signature was not attested in accordance with s. 59 of the Indian Transfer of Property Act; and the Registrar further relied on para. 9 of the Statutory Declaration as a specific allegation of fraud. This paragraph stated that she was advised by her advocate and verily believed that the purported sale of the property by the mortgagees constituted on the part of the mortgagees fraudulent and improper dealing with the property calculated to defeat her claims and rights in her civil case.

The Registrar did not call for a reply to the allegations contained in the statutory declaration, nor did he enquire into their truth. He refused to register the transfer and the appellant appeals therefrom.

Registration under the Crown Lands Act unlike registration under the Registration of Titles Act does not operate as conclusive evidence of title but under s. 99 transactions affecting registered land under the Crown Lands Act must be registered and under s. 100 (1) no evidence shall be receivable in any civil court of the sale of land registered under that Act unless such sale is effected by an instrument in writing and such instrument has been registered under the Act. It would therefore seem that if the appellant wishes to sue Kishen Kaur for possession by virtue of the purported transfer or sale to him by the mortgagees he cannot do so until he has obtained registration.

Section 99 is worth quoting in extenso. It reads:

“All transactions entered into, affecting or conferring or purporting to confer, limit or extinguish any right, title or interest, whether vested or contingent, to, in or over land registered under this Part (other than a letting for one year only or for any term not exceeding one year), and all mutations of title by succession or otherwise, shall be registered under this Part.”

The conveyance to the appellant is certainly a transaction conferring or purporting to confer on the appellant a right, title or interest in land registered under that part of the Act and it is also a transaction which purports to extinguish Kishen Kaur’s rights in the land and also the mortgagees’ rights in respect of the land under the registered instrument purporting to be a mortgage. It is therefore registerable subject to any other provisions to the contrary contained in the Act.

Under s. 97 the Principal Registrar is bound to cause to be recorded in the appropriate folio of the register “the particulars of every document, dealings and other matters by this Act required to be registered or entered in the register affecting the land included under each conveyance, lease or licence”. Therefore subject to any provision to the contrary the Principal Registrar was bound to register or enter particulars of the conveyance to the appellant.

The Principal Registrar relies on s. 109 as justifying his refusal to register that conveyance. This section with its marginal note reads as follows:

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|---|--|
| “Registrar may call for proof and give notice to third parties. 58 of 1959, s. 28 | 109. (1) Every registrar shall be entitled, if he sees fit so to do, to require any person applying for the registration of any document to prove its due execution, the identity of the property affected by the document or of the parties to it and in case of a copy, other than the copy of a judgment, decree or order of a court, the loss or destruction of the original; and, where he may have reason to apprehend that a fraud has been or is about to be committed on any person, he shall give notice to such person of the intended registration in order to prevent the same being effected to his prejudice. |
| | (2) If the registrar is satisfied upon enquiry that the document was duly made, and, in the case of an authenticated copy, of the loss or destruction of the original, and as to the identity of the property or the parties, and that there is no reason to believe that a fraud has been or is about to be committed, he shall, subject to the other provisions of this Part, and the Rules made under this Ordinance, register the document, and that registration shall take effect from the time of presentation. |
| | (3) If he is not satisfied, he shall refuse to register the document, and shall return the same unregistered, together with a statement of his reasons in writing.” |

I think no question is raised as to the due execution, or the identity of the property or of the parties to the conveyance or transfer to the appellant which is in order on the basis of the registered mortgage. The only matter relied upon by the Principal Registrar is the suggestion of fraud not in relation to the conveyance in question but in relation to the earlier registered instrument of mortgage.

I think that is not a good ground for refusal to register the conveyance to the appellant so long as the entry of the mortgage instrument remains on the register as an apparently good registration of a valid mortgage. Kishen Kaur's objection would have been a justifiable cause for refusing to register the mortgage but the mortgage being registered it does not justify the refusal to register the subsequent conveyance to the appellant which is in fact required to be registered by virtue of s. 99.

Kishen Kaur would not be irretrievably prejudiced by the registration of the conveyance in question because if she succeeds in her suit and the mortgage is held to be invalid as a mortgage or if the power of sale is held to be invalid then s. 52 of the Indian Transfer of Property Act would apply and the transfer even though it was registered will not be effective against Kishen Kaur under that section which applies the doctrine of *lis pendens*.

If it were suggested that the appellant was a party to the alleged fraud or that he was a mere nominee of the mortgagees the position would be different but no facts have been alleged or in any way proved which could form the basis for any such suggestion. If such a suggestion had been made and there was any reason to believe that it might possibly be true the proper course for the Registrar would be to hold an enquiry into the suggestion and then to act under s. 109 (2) or (3) (whichever is appropriate) of the Crown Lands Act. I do not think that that suggestion has been raised in this matter. Certainly such a suggestion was not properly raised nor was it enquired into. The conveyance to the appellant was in order on the basis of the documents registered in the folio. It purports to convey the land; there seems to be nothing to indicate that the appellant did not obtain the transfer in good faith. I do not think that in the circumstances the Registrar was entitled to refuse to recognise, or entitled to go behind, the documents registered on the folio and in my opinion the transfer was registerable under s. 97 of the Crown Lands Act.

For these reasons I allow the appeal with costs.

Appeal allowed.

For the appellant:

Khanna & Co., Nairobi

D. N. Khanna

For the respondent:

The Attorney-General, Kenya

D. D. Charters (Senior Crown Counsel, Kenya)

Republic v Mohamed Ng'imba
[1964] 1 EA 308 (HCT)

Division:	High Court of Tanganyika at Dar-es-Salaam
Date of judgment:	25 April 1964
Case Number:	83/1964
Before:	Spry J

[1] Street traffic – Driving licence – Failure to produce licence when required – Right to produce licence at police station within reasonable time – Accused not informed of right – Plea of guilty given in writing – Conviction – Whether plea unequivocal – Whether proceedings a nullity.

Editor's Summary

The accused pleaded guilty in writing to a charge of failing to produce his driving licence when required contrary to s. 21 of the Traffic Ordinance. The proviso to s. 21 states that no person shall be convicted of an offence under that section if he produces his licence to the police within such reasonable time as may be fixed by the police officer requiring its production. The particulars of the charge did not state that the accused was informed of his right to produce the licence within a reasonable time and that he had failed to do so. In revision,

Held –

- (i) if the driver of a motor vehicle is not carrying his driving licence at the time when he is required to produce it, the police officer must inform the driver of his right to take or send it within a reasonable time, to be fixed by the police officer, to a police station nominated by the driver;
- (ii) a charge under s. 21 of the Traffic Ordinance should refer to the failure of the accused to take or send his driving licence to the nominated police station within the time fixed and since there was nothing on the record to show that the accused was informed of his rights under the proviso to s. 21 his plea of guilty could be regarded as unequivocal and the proceedings must be treated as a nullity.

Appeal allowed. Conviction quashed and sentence set aside.

Judgment

Spry J: The accused was charged (inter alia) with “Failing to produce a driving licence, c/ss. 21 and 70 of Traffic Ordinance, Cap. 168”.

The particulars alleged that at a certain time and place the accused “being the driver of motor vehicle Reg. No. DSR 524 on a road, did fail to produce his driving licence, on being required to produce by a Police Officer”. He pleaded guilty in writing, was convicted and fined Shs. 80/-.

Section 21 of the Traffic Ordinance reads:

“Any person driving a motor vehicle on a road and any licensed driver accompanying the holder of a provisional licence under the provisions of s. 20 shall carry his driving licence or provisional licence, as the case may be, and shall on being so required by any licensing authority or police officer produce such licence for examination, so as to enable the authority or police officer to ascertain the name and address of the holder of the licence, the date of issue or renewal and the authority by whom it was issued or renewed:

Provided that no person shall be convicted of an offence against this section if he shall take or send within such reasonable time as may be fixed by the authority or police officer the licence demanded to such district office or police station as may be specified by him at the time the production of the licence was required.”

It is clear from the proviso that if the driver of a motor vehicle is not carrying his licence at the time when

he is required to produce it, the police officer must inform him of his right to take or send it within a reasonable time, to be fixed

by the police officer, to a police station and ask him to nominate the police station to which he will take or send it. It is only if this has been done and the driver has failed to take or send his licence to the nominated police station within the time fixed that the driver can properly be charged with an offence against s. 21.

There is nothing on the record to show that this procedure was followed in the present case. The plea of guilty cannot therefore be regarded as unequivocal, and the proceedings must be treated as a nullity.

Although s. 138(b)(ii) of the Criminal Procedure Code (Cap. 20) provides that:

“it shall not be necessary, in any count charging an offence constituted by an enactment, to negative any exception or exemption from, or qualification to, the operation of the enactment creating the offence.”

It is, I think, essential that charges drawn under s. 21 should contain a reference to the failure of the accused to take or send his licence to the nominated police station within the time fixed. It seems to me, notwithstanding the form of the proviso, that it is more than an exception from or qualification to the operation of s. 21, since the offence is only conditional until the time fixed for producing the licence has expired, when it becomes absolute. A charge which merely refers to the initial failure of the accused to produce his licence cannot, in my opinion, be regarded as giving the accused fair notice of the essential facts alleged against him.

The conviction of the accused on the first count is accordingly quashed and the sentence set aside. The fine of Shs. 80/- is to be repaid to him.

Appeal allowed.

Conviction quashed and sentence set aside.

Naranbhai C Prajapat v Ashok Cotton Co Ltd [1964] 1 EA 309 (HCU)

Division:	High Court of Uganda at Kampala
Date of judgment:	10 March 1964
Case Number:	467/1963
Before:	Udo Udoma
Sourced by:	LawAfrica

[1] *Sale of land – Misrepresentation – Innocent non-disclosure – Ground rent more than stated in title deed – Vendor not aware before sale of increased rent – Vendor and purchaser notified of increase after sale concluded – Property transferred and registered in purchaser’s name – Caveat emptor.*

[2] *Estoppel – Estoppel by conduct – Sale of land – Ground rent more than stated in title deed – Vendor not aware of increased rent before sale – Vendor and purchaser notified of increase after sale concluded – Property transferred and registered in purchaser’s name – Increased ground rent later paid by*

purchaser – Action against vendor based on innocent misrepresentation – Whether purchaser estopped.

Editor's Summary

In January, 1963, the plaintiff negotiated with the defendant to purchase a plot owned by the defendant. The plaintiff's advocate inspected the title deed of the property which showed the ground rent payable as Shs. 700/- per annum. The sale was concluded but, when the transfer was submitted to the Ministry of Lands and Surveys for the Minister's consent and registration, the plaintiff received a copy of a letter written to the defendant stating that the rent for the plot had been Shs. 1,200/- per annum since January 1, 1960, when it was revised, and that consent could not be given until the rent in arrear had been paid.

The defendant paid the amount required to make up the increased rental to 1962 whereupon consent was given and the transfer registered. Subsequently the plaintiff paid the rent for 1963 and sued the plaintiff claiming compensation for the defendant's failure to disclose the increased rent when the terms of the sale were concluded.

Held –

- (i) the evidence showed that the defendant was not aware of the increased rent when the sale was concluded;
- (ii) the plaintiff's claim was founded on an innocent misrepresentation and the form of relief sought, namely, compensation was inappropriate, for if granted it would amount to an award of damages for an innocent misrepresentation;
- (iii) by his conduct in paying without protest the increased rent and having his name registered as owner of the property after he had learnt the correct rental of the plot, the plaintiff was estopped from complaining.

Suit dismissed.

Cases referred to in judgment:

- (1) *Terrence Ltd. v. Nelson*, [1937] 3 All E.R. 739.
- (2) *Norton v. Ashburton* (Lord), [1914] A.C. 932.
- (3) *Freeman v. Baker* (1833), 5 B. & AD. 797.
- (4) *Rutherford v. Acton-Adams*, [1915] A.C. 866.
- (5) *Gilchester Properties Ltd. v. Gomm*, [1948] 1 All E.R. 493.
- (6) *Geer v. Kettle, Re Patent Trust Finance Co. Ltd.*, [1937] 4 All E.R. 396.
- (7) *Pickard v. Sears & Barrett* (1837), 6 AD. & E. 469.

Judgment

Udo Udoma CJ: The plaintiff in this case is a teacher by profession. He seeks to recover against the defendant, a limited liability company in Kampala, the sum of Shs. 6,500/- as compensation, being extra yearly ground rentals payable by him in respect of the plot known as No. 16 Wilson Road, Kampala (hereinafter to be referred to as the plot in dispute) by reason of misrepresentation. The defendant company has resisted the claim. It has insisted that it had made no misrepresentation to the plaintiff, and that, in any case, the plaintiff is estopped by matter in pais.

The suit was instituted by the presentation of a plaint, paras. 3, 4, 5, 6, 7, 8, 9 and 10 of which contained the following material allegations:

- “3. That in terms of a memorandum of sale dated the 1st day of February 1963 between the plaintiff and the defendant, the plaintiff agreed to purchase Plot 16, Wilson Road, Kampala (a copy of the said memorandum of sale is annexed hereto and marked ‘A’) from the defendant.
- 4. That one of the terms of the said memorandum of sale was that the Ground Rent and Rates for the year 1963 were to be paid by the purchaser. The plaintiff was notified that the Ground Rent was Shs. 700/-

per year.

5. On the above representation by the defendants' representative plaintiff concluded the transaction and the necessary papers for the consent of the Governor for the transfer of the premises were lodged with the Land Officer on 19th February 1963.
6. That on or about 22nd February 1963 the plaintiff was made aware by the Director of Land & Surveys Department, Kampala, that the rental of the said lands was increased to Shs. 1,200/- per annum with effect from the 1st January 1960 (a copy of the said letter is annexed hereto and marked 'B').

7. That in terms of the memorandum of sale the plaintiff paid the rental due to the Land Office for the year 1963 on the basis of Shs. 1,200/- per annum.
8. That the defendant failed to disclose the fact as to the increase of the rental to the plaintiff when the terms of sale were concluded.
9. That (sic) a result of the said non-disclosure on the part of the defendant the plaintiff will have to pay an additional sum of Shs. 500/- every year until the next increase of rental which is revisable on the 1st day of September 1975.
10. The plaintiff has called upon the defendant to pay the difference in rental amounting to Shs. 6,500/- being difference for a period of 13 years at Shs. 500/- per year. The defendant has refused to pay the same."

In answer to the averments set out above the defendant company had pleaded in paras. 2, 3, 4, 5, 6 and 7 of its statement of defence as hereunder set forth:

- "2. The defendant admits the terms of sale referred to in paragraph 4 of the Plaint but denies having notified the plaintiff that the ground rent of the property in question was Shs. 700/- per annum.
3. The defendant denies having made the alleged representation directly or through any representative to the plaintiff and states that the transaction was concluded on 1st February 1963 when the Memorandum of Sale (Annexure 'A' to the Plaint) was signed by both the parties.
4. The plaintiff's claim is barred by acquiescence because the plaintiff did not make any objection regarding the amount of ground rent at any time before the grant of the consent to transfer the property in question or the registration of its transfer and in fact paid the said rent amounting to Shs. 1,200/- for the year 1963 to the Land Office before the said consent to transfer the property was granted.
5. The defendant does not admit that he was under any obligation to disclose the amount of ground rent and says that the plaintiff knew or ought to have known the exact amount of the ground rent before he signed the said Memorandum had he made proper inquiries or a search at the office of the Registrar of Titles, Kampala.
6. The defendant says that the plaintiff is estopped from saying that there was misrepresentation about the exact amount of the ground rent and that he the plaintiff was induced to conclude the transaction in question by reason of such misrepresentation, because it was stated in the first paragraph of the said Memorandum of Sale (Annexure 'A' to the Plaint) that 'the purchaser has seen the Certificate of Title and terms of the Lease', and also because he the plaintiff obtained the consent to transfer from the Land Office and caused the Transfer to be registered after the receipt of the letter dated 22/2/63 from the Director of Lands and Surveys (Annexure 'B' to the Plaint).
7. In the alternative and without prejudice to what is stated above the defendant states that the plaintiff's claim for Shs. 6,500/- is excessive and unreasonable."

On the pleadings and submissions of counsel it is common ground that the claim is founded on innocent misrepresentation. It is also common ground that the title deed of the plot in dispute did not disclose the fact that the ground rent payable in respect of the plot in dispute was in 1960 revised from Shs. 700/- to Shs. 1,200/- per annum. The ground rent was shown in the title deed as Shs. 700/- per annum. That information was, after inspection and perusal of the title deed, passed on to the plaintiff by his solicitor, J. S. Shah (P.W.3).

It should be noted that neither the title deed nor the certificate of title of the plot in dispute was produced and exhibited in these proceedings.

On the evidence the circumstances of this case are these: On January 3, 1963, Jayantilal Mehta (P.W.4), a broker by trade in Kampala, offered for sale at the price of Shs. 105,000/- to the plaintiff, who there and then agreed to buy the plot in dispute. When the plaintiff asked for details of the plot Jayantilal Mehta (P.W.4) referred him to J. S. Shah, an advocate in Kampala. The plaintiff then approached, consulted and retained the services of J. S. Shah (P.W.3) as his solicitor for the purpose of completing negotiations for the purchase of the plot in dispute.

The plaintiff also there and then instructed J. S. Shah (P.W.3) to obtain all necessary information concerning the property and to conclude negotiations for the contract of sale. He deposited with him the sum of Shs. 5,000/- towards the price of the property.

Acting on those instructions, J. S. Shah (P.W.3) inspected the title deed of the property in the office of the defendant company's advocate. He noted that the yearly ground rental shown in the title deed was Shs. 700/-. He thereafter advised the plaintiff accordingly. The plaintiff also himself inspected the title deed. J. S. Shah (P.W.3) then proceeded to complete the necessary negotiations for the purchase of the plot in dispute and finally agreed the purchase price with the defendant company at Shs. 105,000/-. On the instruction of the plaintiff, J. S. Shah (P.W.3) drew up the memorandum of sale, Exhibit D, containing the terms and conditions of the contract. The memorandum of sale, Exhibit D, was approved by the defendant company and later executed by the defendant company and the plaintiff on February 1, 1963.

In terms of the memorandum of sale, Exhibit D, and in the due performance of one of the conditions therein stipulated, on February 15, 1963, the sum of Shs. 100,000/-, being the balance of the purchase price, was promptly paid by the plaintiff, and on February 16, 1963, the document of transfer of ownership of the plot in dispute from the defendant company to the plaintiff was duly executed by both the plaintiff and the defendant company. On February 19, 1963, the defendant paid his solicitor, J. S. Shah (P.W.3) the sum of Shs. 700/- as the annual rental for the year 1963 in respect of the plot in dispute.

The sale having thus been concluded, J. S. Shah (P.W.3) submitted the document of transfer of ownership of the property to the Ministry of Lands and Surveys, both for the necessary consent of the Minister and for the registration of the title by the Registrar of Titles.

Then came the trouble. The hornet's nest had been stirred. J. S. Shah (P.W.3) and the plaintiff subsequently received copies of a letter, Exhibit A, which was addressed to the defendant company. In the letter, Exhibit A, it was pointed out by the Director of Lands and Surveys that the correct yearly ground rental of the plot in dispute was Shs. 1,200/- and not Shs. 700/-, as the rent had been revised since January 1, 1960. The letter, Exhibit A, further stipulated that until the difference in the rent in arrear had been paid and the revised rental registered on the title of the plot in dispute consent to transfer the property could not be given by the Minister.

When the defendant company learnt from J. S. Shah (P.W.3) of the increased rent, it appeared surprised and immediately assured J. S. Shah (P.W.3) that the defendant company had known nothing of the revised rent as the revision had not been brought to its notice, and that up to the year 1962 the Director of Lands and Surveys, according to the demand notices, Exhibits F.1 to F.3, in these proceedings, had always demanded and the defendant company had always paid the sum of Shs. 700/- as the annual rental of the plot in dispute.

On receiving the letter, Exhibit A, the defendant company and its advocate made representations to the Director of Lands and Surveys. The representations proved of no avail. The defendant company thereupon decided to pay, and immediately paid, the difference in arrear of the increased rental from 1960 to 1962, and so informed J. S. Shah (P.W.3), who, in turn, advised the plaintiff to pay only the difference of Shs. 500/- for 1963, if need be, by instalments, which was permissible by the Ministry.

The arrears having been paid by the defendant company, the requisite consent was given by the Ministry on March 14, 1963, and the document of transfer of ownership by the defendant company to the plaintiff was registered in the Register of Titles in March, 1963. The plaintiff later paid the extra increased rent of Shs. 500/- in October, 1963, when the same was demanded by the Director of Lands and Surveys.

As from this point the evidence given by the plaintiff is at variance with that given by his solicitor, J. S. Shah (P.W.3), and should be separately stated. It is the case of the plaintiff that at first, on receiving a copy of the letter, Exhibit A, he had told his solicitor, J. S. Shah (P.W.3) that he would not be in a position to be paying the increased yearly ground rental of Shs. 1,200/-, and that the purchase price of Shs. 105,000/- already paid by him should be refunded to him, unless something could be done to relieve him of the increased rental. His solicitor, J. S. Shah (P.W.3), who at first had assured him not to worry because he was going to have the matter settled, later advised him that it was impossible for the purchase price to be refunded to him as he, J. S. Shah (P.W.3), had already paid over the money to the defendant company.

The plaintiff says that he was dissatisfied with that advice, and had therefore to retain the services of another firm of solicitors, Messrs. Russell & Co., who, on his instructions, addressed the letter, Exhibit B, dated June 1, 1963, to the defendant company and, in return, received the letter, Exhibit C, in reply from the defendant company's solicitors. Thereupon this action ensued.

The evidence by the plaintiff that he had demanded the refund of his purchase money, which, in substance, is that he had repudiated the contract between him and the defendant company, albeit corroborated by Jayantilal Mehta (P.W.4), has been stoutly denied by his solicitor, J. S. Shah (P.W.3), whose evidence I prefer and accept on this point. J. S. Shah (P.W.3) has sworn that when the plaintiff brought to him his own copy of the letter, Exhibit A, he had told him that on enquiry he had been informed that the defendant company had already paid the difference in the rent brought about by the increase from Shs. 700/- to Shs. 1,200/- per annum from 1960 to 1962. He, therefore, advised the plaintiff to pay the balance of Shs. 500/- so as to make up the difference for the year 1963, since he had already deposited with him the sum of Shs. 700/- towards the rent for that year.

I believe J. S. Shah (P.W.3) spoke the truth. I am reinforced in this by the fact, which I do find, that the letter, Exhibit B, from Messrs. Russell & Co. to the defendant company, does not support the plaintiff's contention. For it is not therein stated that the plaintiff had repudiated the contract of sale. On the contrary, what is contained in the letter, Exhibit B, is a demand by the plaintiff for compensation of Shs. 6,000/-, being the additional rentals, which would have to be paid by him by reason of the increase in respect of the ground rent of the property from 1963 to 1975, when the rent would again be due for revision. If it were true that the plaintiff did repudiate the contract, it is strange that that fact was not mentioned in the letter, Exhibit B. I am satisfied and find as a fact that the plaintiff did not at all repudiate the contract of sale, and that all he wanted was a refund of the extra rent which he would be called upon to pay from 1963 to 1975, which is the subject-matter of this action.

It is clear on the evidence, and I also find as a fact, that at the time when the contract of sale was concluded and the document of transfer of ownership executed by the plaintiff and the defendant company, neither the defendant company nor the plaintiff knew that the yearly rental of the plot in dispute had been increased from Shs. 700/- to Shs. 1,200/- by the Ministry of Lands and Surveys, and that that increase was effective as from January 1, 1960. I accept the evidence of the defendant company that the increase was not brought to its notice by the Ministry of Lands and Surveys until it received the letter, Exhibit A; and that prior to that date the Director of Lands and Surveys had always demanded and the defendant company had always paid the original rent of Shs. 700/- per annum in respect of the property. That must be so because even the Registrar of Titles, I find on the evidence, had received no notification of the increased rent until March 5, 1963.

It is incomprehensible how it came about that the Ministry of Lands & Surveys, whose duty it was to revise the rent at the appropriate time and thereafter to inform the Registrar of Titles of the revised rent, in order that the same might be noted in the Register of Titles, did not in fact do so in January, 1960, when the rent is said to have been revised. Until the application by the plaintiff for the consent of the Minister for the transfer of ownership and thereafter to be registered as the proprietor of the plot in dispute, there was nothing in the Register of Titles to indicate any change in the rent payable in respect of the property.

As has already been observed, the representation complained of in this case has never been suggested to be fraudulent. There has been, and, indeed, on the evidence, there can be, no imputation that the information concerning the increased rent was intentionally or deliberately withheld or concealed from the plaintiff. It has been freely admitted by counsel for the plaintiff that it was an innocent statement as to the rent which turned out to be wrong.

Furthermore, this is not a claim founded on a breach of warranty, as, on the evidence, there was none given. Counsel for the plaintiff has contended that since there was a misrepresentation, albeit innocent, as to the correct rental payable on the plot in dispute as shown in the title deed, the plaintiff ought to be compensated, since he was misled by the contents of the title deed made available to him. He has submitted that the plaintiff has suffered damages in that he would be out of pocket every year from 1963 to 1975 in the sum of Shs. 500/-, which he did not bargain for; and that that sum ought to be refunded by way of compensation to him by the defendant company.

Counsel for the defendant company has submitted that there was no misrepresentation at all by the defendant company; that if there was any misrepresentation it was an innocent one, and cannot be a ground for a claim for damages; and that, in any case, it was the duty of the plaintiff to make all necessary enquiries independently of the information supplied to him by the defendant company, having regard to the condition of sale contained in the memorandum of sale, Exhibit D. As the authority for this submission that innocent misrepresentation cannot be a ground for damages Mr. Patel cited and relied on *Terrene Ltd. v. Nelson* (1).

It has also been contended for the defendant company that the plaintiff is estopped by his conduct in paying the increased rent, and having his name registered as proprietor of the property after the Minister had given his consent, and after the knowledge of the correct rental of the plot.

Counsel for the defendant's submission that there was no misrepresentation at all by the defendant company as to the rent payable in respect of the plot in dispute can be dismissed as lacking in substance. I think it is correct to say that, although the defendant company did not communicate directly with the

plaintiff during the negotiations for the purchase of the plot in dispute, and, although also I am satisfied, and find, that Jayantilal Mehta (P.W.4) was not an authorised agent of the defendant company for the sale of the plot in dispute, there can be no doubt whatsoever that by making the title deed or Certificate of Title (one is not sure which) of the property available for the inspection of the solicitor of the plaintiff, the defendant company was in fact representing to the plaintiff that the rent payable annually in respect of the plot in dispute was Shs. 700/- as shown in the document of title. Jayantilal Mehta (P.W.4), I find, was not appointed specifically by the defendant company as broker for the sale of the property. His identity, at his own request, was not even disclosed to the defendant company during the negotiations for the purchase of the property. But J. S. Shah (P.W.3), as solicitor was acting, I hold, as the agent of the plaintiff, and in that capacity had inspected the documents of title made available to him by the defendant company.

The question then is, can the representation which was made to the plaintiff in respect of the rent payable for the plot in dispute, which, in the circumstances of this case, was innocent but erroneous, be the foundation for the form of relief, namely damages by way of compensation, sought in this case by the plaintiff? I think not. For it is a well-established general principle of law that, apart from some special arrangement or some special evidence of intention, a vendor does not guarantee or warrant the correctness of information given. The court would not allow damages for breach of an innocent misrepresentation under the guise of a breach of warranty. That was the principle long ago enunciated by Viscount Haldane, L.C., in *Norton v. Ashburton* (Lord) (2), and which was quoted with approval in *Terrene Ltd. v. Nelson* (1). See also *Freeman v. Baker* (3) and *Rutherford v. Acton-Adams* (4).

I would however agree with counsel for the plaintiff that *Terrene Ltd. v. Nelson* (1) was a claim for damages for breach of warranty and not for innocent misrepresentation; and, to that extent, it is distinguishable from the instant case and therefore strictly irrelevant to the circumstances present in this case. Yet I think it is right to state that even so, in the course of that judgment, the court did enunciate certain authoritative general principles of law, which have been of assistance to this court in the present case.

In his judgment in that case Farwell, J., at p. 744, had said:

“In the ordinary case (of a sale of real estate) a purchaser has to go for his information to the vendor, but, bearing in mind the principle of caveat emptor, he is bound to make proper enquiries for himself. . . .

When a purchaser, with a possible view of making an offer for the property, seeks information from the vendor, the vendor, of course, is bound to the best of his ability to supply him with accurate information. . . .

If he makes a representation either knowingly – and in that sense fraudulently – or recklessly, without caring whether the statement made is true or false, which, again amounts to a fraudulent misrepresentation at law, the purchaser has his remedy in damages, and, in certain circumstances he may be entitled to be relieved from the contract into which he has entered, if it was induced by such misrepresentation. On the other hand, if the representations made prove to be wrong, but were made in good faith, and innocently, the purchaser has no claim to damages.”

In the present case there has been no direct evidence, which I can accept, that the plaintiff was induced solely by the representation that the rent was Shs. 700/- to enter into the contract, nor is there any evidence by the plaintiff that if the rent had been shown to be Shs. 1,200/- at the time he would not

have entered into the contract to purchase the plot in dispute. The only circumstances present in this case which could possibly be considered as giving rise to such an inference is the fact that the plaintiff has brought this action at all. But I think such inference is negatived by the fact that the plaintiff is not seeking to rescind the contract. He is asking for compensation. Applying the principles stated in *Terrene Ltd. v. Nelson* (1) by Farwell, J., as contained in the last paragraph of the passage quoted above, I am of the opinion that the form of relief sought in this case is inappropriate; for, if granted, it would amount to an award of damages for innocent misrepresentation.

In *Gilchester Properties Ltd. v. Gomm* (5), the plaintiff, who had contracted with the defendant for the purchase of certain leasehold premises, had claimed specific performance of the contract and an abatement of £550 in the purchase price in respect of an innocent misrepresentation by the vendor's agent, during the preliminary negotiations to the effect that the rents payable by the tenants of the property amounted to £449 10s., whereas, in fact, they amounted only to £398 10s. Romer, J., refused the relief claimed on the ground that the form of the relief claimed was inappropriate as it would amount to an award of damages in respect of an innocent misrepresentation.

The submission of counsel for the defendant that independently of the information supplied by the defendant company, it was the duty of the plaintiff to make diligent enquiries seems to me well founded. The condition in the memorandum of sale regarding ground rent was stated in the following terms:

"Ground rent and rates for the year 1963 will be borne by the purchaser."

There was no amount specified in that statement. It was not stated that the ground rent referred to in the memorandum of sale meant the ground rent to be found on inspection in the title deed or Certificate of Title, as the case might be. It seems that the condition as framed implied that whatever was found to be the ground rent and rates for the year 1963 should be borne by the purchaser. That was sufficient in my view to put the plaintiff on an enquiry. There is no evidence that apart from the inspection of the title deed or Certificate of Title any other enquiry was ever undertaken. It is probable that an enquiry at the Ministry of Lands and Surveys would have yielded the information regarding the new rent as revised in 1960.

I think this is a case in which the maxim caveat emptor should apply. The plaintiff must take the property as he finds it. It is not a question of a defective title or of an easement existing on the property.

On the authority of *Greer v. Kettle – Re Patent Trust & Finance Co. Ltd.* (6), it was also contended that the plaintiff was estopped by matter in pais in that he had paid the increased rent, without protest regarding the amount of ground rent at any time before the grant of consent to transfer the property by the Minister, and before being registered as the proprietor in the Register of Titles. I think there can be no answer by the plaintiff to that contention, which I consider sound, although the authority cited and relied upon for this submission is, in my view, completely irrelevant.

In *Greer v. Kettle, Re Patent Trust & Finance Co. Ltd.* (6) it was held by the House of Lords that the recital in the deed in that case was not binding upon the guarantors, who were not estopped from setting up the facts nor from asserting the non-existence of a charge on the shares in question in that case. That decision is of course quite the opposite of the point, which was argued in favour of the defendant company in this case.

The proper authority for the plea of estoppel in pais is the well-known case of *Pickard v. Sears & Barrett* (7) (112 English Reports, at p. 179) in which the law was laid down at p. 81 as follows:

“But the rule of law is clear, that, where one by his own words or conduct wilfully causes another to believe the existence of a certain state of things, and induces him to act on that belief, so as to alter his own previous position, the former is precluded from averring against the latter a different state of things as existing at the same time.”

I think the plea of estoppel in pais by the defendant company is sustainable. Neither the plaintiff nor his solicitor, J. S. Shah (P.W.3), I find at any time prior to the letter, Exhibit B, from Messrs. Russell & Co., ever protested or resented, to the knowledge of the defendant company, the payment of the increased rent on the plot in dispute. On the contrary, the evidence, which I accept, is that in spite of the increased rent, the consent of the Minister for the transfer of ownership of the property was duly obtained and a document transferring ownership from the defendant company to the plaintiff was also duly registered in the Register of Titles in March, 1963. The defendant company was, in my view, entitled to regard the transaction satisfactorily concluded and itself divested of the proprietorship of the property concerned. The plaintiff cannot, therefore, be heard to complain against the defendant company in this respect.

In all the circumstances of this case I have come to the conclusion that this action must fail. It is accordingly dismissed with costs.

Suit dismissed.

For the plaintiff:

Russell & Co., Kampala

P. V. Phadke

For the defendant:

Patel & Dave, Kampala

J. K. Patel

Credit Finance Corporation Ltd v Abdul Aziz R Lanani
[1964] 1 EA 317 (HCU)

Division: High Court of Uganda at Kampala

Date of judgment: 17 February 1964

Case Number: 284/1963

Before: Udo Udoma CJ

Sourced by: LawAfrica

[1] *Hire purchase – Default in payment of instalments – Attempt to repossess vehicle unsuccessful – Intention to repossess vehicle not communicated to hirer or guarantor – Vehicle repossessed after five months – When hire purchase agreement terminated.*

[2] *Damages – Hire purchase – Hiring terminated by owner – Motor vehicle repossessed by owner –*

Measure of damages.

[3] Hire purchase – Agreement – Guarantor undertaking to pay all monies due by hirer – Agreement terminated by owner – Judgment obtained against hirer for instalments and repairs – Claim against guarantor for that amount and costs of action against hirer – Whether guarantor liable to indemnify owner.

Editor's Summary

By a hire purchase agreement made in August, 1960, the plaintiff company hired a vehicle to one, K., and by a document headed "Guarantee" the defendant guaranteed the punctual payment to the plaintiff company of all monies due thereunder. K. defaulted when payment of the second instalment fell due and in November, 1960, the plaintiff company unsuccessfully tried to repossess the vehicle. In December, 1960, the plaintiff company notified the defendant of the default and claimed the instalments in arrears but without indicating any intention to terminate the agreement. The plaintiff company then instructed its

advocates who in March, 1961, claimed from the defendant the overdue payments. The defendant replied seeking authority to repossess the vehicle for the plaintiff company which was given whereupon the defendant seized the vehicle and returned it to the plaintiff company. The plaintiff company having obtained judgment against K. but without recovering anything then sued the defendant claiming that the guarantee was an indemnity, and that, therefore, the defendant was liable to make good whatever damages and loss had been suffered by the plaintiff. For the defendant it was contended that the document was a guarantee and that the hire purchase agreement was terminated by the plaintiff company in November, 1960, when their agent was instructed to repossess the vehicle.

Held –

- (i) the hire purchase agreement was terminated in April, 1961, and not in November, 1960, because at that time the intention to terminate the agreement was not communicated either to the hirer or to the defendant;
- (ii) the document signed by the defendant was a guarantee and both the plaintiff and the defendant had so understood and treated it all along;
- (iii) where under a hire purchase agreement the hire is determined by the owner because the hirer is in arrear with his payments of the hire instalments, the damages recoverable by the owner are the instalments in arrears and unpaid and the interest on such arrears;
- (iv) the plaintiff was entitled to Shs. 1,829/38 being the arrears of hire rentals from October, 1960, to April, 1961, with interest at twelve per cent. per annum and the sum of Shs. 337/50 being the expenses of the abortive attempt to repossess the vehicle in November, 1960.

Judgment for the plaintiff for Shs. 2,166/84.

Cases referred to in judgment:

- (1) *Elsey & Co. Ltd. v. Hyde* (unreported) (Mentioned in Jones & Proud-foots Notes on Hire Purchase Law (2nd Edn.), p. 107).
- (2) *Cooden Engineering Co. Ltd. v. Stamford*, [1952] 2 All E.R. 915.
- (3) *Financing Ltd. v. Baldock*, [1963] 1 All E.R. 443.

Judgment

Udo Udoma CJ: In this suit the plaintiff, a limited liability finance company incorporated in Kenya and carrying on business in Uganda, has claimed against the defendant the sum of Shs. 3,878/58 under an agreement contained in a hire purchase agreement.

On August 15, 1960, the plaintiff company entered into a hire purchase agreement, which is exhibited in these proceedings and marked Exhibit B, with one Amisi Kiwanuka, not a party to this action, in respect of a motor vehicle, an Opel Kapitän No. UGA 68.

At the foot of the hire purchase agreement, Exhibit B, and attached thereto is another document which is headed in capital letters “GUARANTEE”, the word “guarantee” being underlined. The document headed guarantee is the subject-matter of this suit. It was executed in favour of the plaintiff company by

the defendant.

By the terms of the document, the defendant “guaranteed the punctual payment to the plaintiff company of all monies due to be made by the hirer under the hire purchase agreement”, etc.

Under the agreement, Exhibit B, and in pursuance thereof Amisi Kiwanuka (hereinafter called the hirer) had hired a car No. UGA 68 from the plaintiff company at the cash price of Shs. 4,800/-. He paid down as the first instalment rental or deposit on taking delivery of the vehicle the sum of Shs. 2,000/-, leaving a balance of Shs. 3,136/08, including hire charges of Shs. 336/08, which

he undertook to pay off by eleven equal monthly instalments of Shs. 261/34 and one final instalment, including the charge of Shs. 20/- for the exercise of the option to purchase, of Shs. 281/34.

In consideration of the hiring of the car No. UGA 68 to the hirer by the plaintiff company, the defendant entered into and executed in favour of the plaintiff company the document headed guarantee at the foot of the hire purchase agreement, Exhibit B, already mentioned herein. On September 15, 1960, the first hire instalment rental of Shs. 261/34 became due and payable. The hirer promptly and punctually paid it. But on October 15, 1960, when the second instalment rental fell due the hirer defaulted; and since then he has made no further payment of any of the hire instalment rentals.

In November, 1960, because the hirer had defaulted in the payment of his instalments the plaintiff company hired the services of an agent, Laljee Devjee Kotecha (P.W.2) and instructed him to search for the car, No. UGA 68, and if he found it to retake and repossess it on its behalf. Those instructions were contained in a form similar to Exhibit D in these proceedings.

Acting upon those instructions, Laljee Devjee Kotecha (P.W.2) by his employee, Charles Kabano (P.W.3), searched for the vehicle. In spite of a search which extended to Mubende in Mbarara area Laljee Devjee Kotecha (P.W.2) was unsuccessful in tracing either the hirer or the car No. UGA 68 and so informed the plaintiff company, at the same time forwarding to the said plaintiff company his bill, Exhibit C, for the expenses incurred by him in that fruitless search. The bill, Exhibit C, is dated December 15, 1960.

In December, 1960, the plaintiff company by its letter, Exhibit A1, brought to the notice of the defendant the fact that the hirer had made no payments of his hire instalment rentals for the months of October and November, 1960. It also drew the attention of the defendant to his guarantee under the hire purchase agreement, Exhibit B, and called upon him to make good those arrears including the instalments which would fall due on December 15, 1960.

At this juncture, I pause to note that in the letter, Exhibit A1, to the defendant, the plaintiff company had referred to the document executed by the defendant as a guarantee. The plaintiff company did not then indicate therein any intention to terminate the hire purchase agreement, Exhibit B, in the exercise of its right under cl. 4 (1) of the agreement; nor did it mention its abortive attempt at repossessing the car, the subject-matter of the hire purchase agreement, Exhibit B.

There was however no reply forthcoming from the defendant to the letter, Exhibit A1. Thereupon the plaintiff company through its advocates by a letter, Exhibit A2, dated March 1, 1961, demanded payment of the sum of Shs. 1,640/54 described therein as "overdue rentals in respect of agreement No. 15248.15 – Amisi Kiwanuka – which payment was guaranteed by you"; and threatened action in default of the recovery of the said sum. The letter, Exhibit A2, evoked a reply from the defendant. By his letter, Exhibit A3, dated March 10, 1961 (English translation Exhibit A4) the defendant informed the plaintiff company that the car, No. UGA 68, was at the house of the hirer and requested an authority to retake and repossess it on behalf of the plaintiff company and thereafter to deliver the same to the said company at Kampala.

On March 25, 1961, the plaintiff company by its letter, Exhibit A5, promptly forwarded to the defendant the required authority. Acting on that authority, the defendant took possession of the car, No. UGA 68, and by his letter, Exhibit A6, dated April 3, 1961 (English translation Exhibit A7) duly informed the plaintiff company of that fact. As the car was then at Nabingola the defendant indicated that he was awaiting further instructions from the plaintiff company as to whether to bring the car down to Kampala.

Then on April 8, 1961, the plaintiff company by its letter, Exhibit A8 (English translation Exhibit A9) demanded from the defendant as guarantor the sum of Shs. 3,228/58 described as the outstanding balance on the motor vehicle. The plaintiff company in that letter also indicated that on the payment by the defendant of the amount called for, it would transfer the vehicle to the name of the defendant. Or alternatively, that if the defendant wished he should deliver the motor vehicle to the plaintiff company, in which case the latter would sell it, the defendant as the guarantor being only responsible for whatever loss might result from such sale.

As from this point the evidence of the plaintiff company is at variance with that of the defendant and must be stated separately. It is the case of the plaintiff company that as there was no reply from the defendant to the letter, Exhibit A8, on the instructions of the plaintiff company a letter, Exhibit A10, dated June 1, 1961, was addressed by the plaintiff company's advocate to the defendant and that the demand for the payment of Shs. 3,228/58 was therein repeated, coupled with a threat to recover the debt by court action in default. Thereafter as the defendant did nothing as to the payment of the debt, the plaintiff company instituted an action against the hirer and obtained judgment in default of appearance in the sum of Shs. 3,878/58 with interest at six per cent. and costs, which is the sum now claimed against the defendant since the judgment debt has not been satisfied by the hirer.

But according to the defendant, whose evidence on this point sounds to me more probable, immediately on receiving the letter, Exhibit A8, he had, on April 12, 1961, himself brought down the car No. UGA 68 to Kampala and had delivered the same at the office of the plaintiff company to one Mr. Pandya, a clerk in the said office; and that on delivering the car he was told that it would be sold by the plaintiff company and the money realised from the sale credited to the hire purchase account. The defendant says that with him on the occasion when he delivered the car there was one African, whom he had introduced to Mr. Pandya as interested in buying the car after the same should have been repaired. After taking possession of the car, the plaintiff company subsequently delivered the same to Balli Garage then under the management of Iqbal Mirza (D.W.2) for repairs. It is the defendant's case that since then he has neither seen nor known anything about the car.

As already indicated, I prefer the story told by the defendant and his witness Iqbal Mirza (D.W.2) to that of the plaintiff company, as to the delivery of the car, No. UGA 68, in April, 1961, to the plaintiff company and the subsequent handing over of the said car by Mr. Pandya, whom I find was then a clerk in the office of the plaintiff company, to Iqbal Mirza (D.W.2) for repairs on behalf of the company. The story told by the defendant on this point sounds highly probable to me. It is consistent, I find, with the alternative offer made by the plaintiff company to the defendant as contained in paras. 4 and 5 of the plaintiff company's letter Exhibit A8 (English translation Exhibit A9) of April 8, 1961.

I have therefore no hesitation in accepting it as the truth, and, in finding that on April 12, 1961, the defendant did in obedience to the instructions of the plaintiff company deliver back to the plaintiff company at its office at Kampala the car No. UGA 68, the subject-matter of the hire purchase agreement Exhibit B, and also that the plaintiff company did then in fact take delivery of and accept the said car from the defendant. I hold that in doing so the plaintiff company was exercising its right under cl. 4 (1) of the agreement, Exhibit B, thereby terminating the agreement, Exhibit B, and retaking and resuming possession of the car, No. UGA 68. I am satisfied and find as a fact that the agreement, Exhibit B, was duly determined by the plaintiff company, not in November, 1960, as has been submitted by counsel for the defendant, but in April, 1961.

I reject as unsound and unreasonable counsel for the defendant's contention that the agreement, Exhibit B, was terminated in November, 1960, when the plaintiff company commissioned Laljee Devjee Kotecha (P.W.2) to retake and repossess the car No. UGA 68, even though the attempt to retake and repossess the car had proved abortive.

It was difficult to understand the reasoning in counsel for the defendant's contention. For even though the plaintiff company might have intended, and indeed, did intend, to repossess the vehicle and had expressed that intention by the overt act of commissioning an agent to carry that intention into effect, the fact remains that the intention was not communicated either to the hirer or to the defendant. Neither the car nor the hirer thereof was then found. It was therefore impossible to put the intention into effect. In the circumstances I am unable to hold that the agreement, Exhibit B, was determined in November, 1960.

Finding as I do that the agreement was effectively and conclusively determined in April, 1961, when the plaintiff company accepted delivery of and repossessed the vehicle, car No. UGA 68, in the exercise of its rights under cl. 4 (1) of the agreement, Exhibit B, the question then is, what are the liabilities of the defendant under the document at the foot of Exhibit B executed by him. The answer to that question would naturally depend upon whether the document is an indemnity as has been contended by counsel for the plaintiff company, or a guarantee, which is the contention of counsel for the defendant.

Counsel for the plaintiff has submitted that the document at the foot of Exhibit B is an indemnity and that therefore the defendant must be held liable to make good whatever damages and loss have been suffered by the plaintiff company by reason of the hire purchase agreement, Exhibit B. He has contended that the total loss sustained by the plaintiff company as a result of the transaction is the sum of Shs. 3,878/58 now claimed by the plaintiff company in this action.

For the defendant, counsel for the defendant's contention is that the document is a guarantee and that the liability of the defendant is dependent upon actual default made by the hirer, who under the agreement, Exhibit B, is the principal debtor.

The document which was executed by the defendant in favour of the plaintiff company and now the subject-matter of this dispute runs as follows:

“

GUARANTEE

To CREDIT FINANCE CORPORATION LIMITED, P.O. Box 12302,

Nairobi, Kenya.

DATED this day of 19

In consideration of your hiring the above Vehicle to the within named Hirer at my request, I hereby guarantee the punctual payment to you of all monies due to be made by the Hirer under this Hire-Purchase Agreement, and the due performance and observance by the Hirer of all the terms and conditions of this Agreement on his part to be performed and observed. I undertake to indemnify you against all loss and damage resulting to you from any breach by the Hirer of such terms and conditions. I further agree to pay you on demand any monies which have become due under this Agreement but have not been paid to you by the Hirer; and that your rights under this Guarantee shall not be prejudiced by your granting any time or other indulgence to the Hirer or by any variation in any of the terms of the said Hirer-Purchase Agreement.

Full Names of Guarantor (IN BLOCK LETTERS) Mr. ABDUL AZIZ R. LALANI.”

Now it was particularly urged by counsel for the plaintiff that by reason of the sentence which reads:

“I undertake to indemnify you against all loss and damage resulting to you from any breach by the hirer of such terms and conditions”,

the whole document should be regarded as an indemnity in the strict legal sense of the term in that the obligation undertaken by the defendant was a primary obligation to secure the plaintiff company against loss if the transaction should turn out unremunerative.

In the circumstances of the instant case, I think it will be straining language to regard this document as an indemnity. In the plaintiff company's letters to the defendant, Exhibits A1, A2, A8, (A9) and A10, the undertaking entered into by the defendant as contained in this document has been consistently referred to and described by the plaintiff company as a guarantee, and the defendant also consistently described as a guarantor. In para. 3 of the plaint filed in this action the document is also referred to as a guarantee. The document is itself headed guarantee written in block letters.

I am satisfied and hold that the document at the foot of the hire purchase agreement, Exhibit B, which was signed by the defendant, is a guarantee. Both the plaintiff company and the defendant had so understood it at the time and have so treated it all along. The document, I find, is a collateral contract to answer for the default of another person, the hirer, as the principal debtor, that is, and therefore a contract that is ancillary or subsidiary to another contract, namely the hire purchase agreement, Exhibit B. It is not therefore a contract by which the defendant undertakes an original and independent obligation.

By this document the defendant undertook to guarantee the performance of certain specific obligations, one of which was to pay the hire instalment rentals when they fell due, which the hirer had undertaken himself to perform. The defendant can therefore be made answerable under his undertaking only when the principal debtor, the hirer, that is, has made default in the performance of his obligation under the agreement, Exhibit B. On the evidence the only default which was made by the hirer was failure to pay the hire instalment rentals, the the first breach thereof occurring on October 15, 1960.

It should be noted that when the breach occurred the plaintiff company was entitled to call to its aid either the guarantee, which was entered into in its favour by the defendant, or to invoke cl. 4 (1) of the hire purchase agreement, Exhibit B. The plaintiff company, however, elected to pursue the latter remedy. It terminated the agreement, Exhibit B, and retook and repossessed the car No. UGA 68 in April, 1961.

The question then is what damage is the plaintiff company entitled to recover from the hirer for that breach? For it is only such damage as the plaintiff company can successfully recover from the hirer for the breach so committed that the defendant can be made to answer for. It should also be observed that the hire purchase agreement, Exhibit B, was terminated not by the hirer but by the plaintiff company, the owner of the vehicle.

It may be stated as a general proposition of law that where under a hire purchase agreement the hire is determined as in this case by the owner because the hirer is in arrear with his payment of the hire instalment rentals damages recoverable by the owner are the instalments in arrears and unpaid and the interest on such arrears. That was the law laid down by Salter, J., in 1926 in *Elsey & Co. Ltd. v. Hyde* (1), quoted with approval by Jenkins, L.J., in *Cooden Engineering Co. Ltd. v. Stamford* (2) ([1952] 2 All E.R., at p. 923).

In *Elsey & Co. Ltd. v. Hyde* (1) Salter, J., said:

“... where the hire is determined by the owner, because the hirer is in arrear with his payments. It is proved that this is a breach of the contract and it is proved that that breach apart from any termination of the hirer, would give the owner a right to damages against the hirer. But what would those damages be? They would be interest on the amount unpaid and nothing more. The fact that the hirer is in arrear with his payments will not entitle the owner to any damages for depreciation of these things. The reason that they have suffered is that they have second-hand goods put on their hands before they have received very much money in respect of them. That is not the result of the hirer's breach of contract, in being late in his payments, it is the result of their own election to determine the hiring.”

See also the observations of Lord Denning, M.R., in *Financings Ltd. v. Baldock* (3) ([1963] 1 All E.R., at p. 446).

Applying these principles to the facts of the instant case, I accept the submission of counsel for the plaintiff and hold that in law the damages recoverable by the plaintiff company from the hirer for the breach of contract in failing to pay his hire instalment rentals, are the arrears of the hire rentals from October, 1960, to April, 1961, that is for seven months at Shs. 261/34 per mensem, which amount to Shs. 1,829/38 and interest on the arrears at twelve per cent. per annum, together with the sum of Shs. 337/50, being expenses of the abortive tracing in November, 1960, which I am satisfied were reasonably incurred. I hold that the plaintiff is entitled to recover that same amount from the defendant.

In the result I would enter judgment for the plaintiff company against the defendant in the sum of Shs. 1,829/34 plus Shs. 337/50, totalling Shs. 2,166/84 with interest at twelve per cent. per annum up to the date of payment with costs.

Judgment for the plaintiff for Shs. 2,166/84.

For the plaintiff:

Hunter & Greig, Kampala

A. I. James

For the defendant:

Dalal & Singh, Kampala

S. H. Dalal

Mehar Singh Bros Ltd v Ruparel Investment Ltd [1964] 1 EA 324 (SCK)

Division: Supreme Court of Kenya at Nakuru

Date of judgment: 8 April 1964

Case Number: 126/1961

Before: Trevelyan J

Sourced by: LawAfrica

[1] Arbitration – Award – Application to set aside – Award made after time allowed by court – No evidence heard by arbitrators – No depositions or documents filed with award – Invalidity of award – Civil Procedure Act, s. 81, s. 95 and s. 97 (K.) – Civil Procedure (Revised) Rules, 1948, O. 45, r. 8 and r. 18 and O. 49, r. 5 (K.).

Editor's Summary

The plaintiffs had sued the defendant for Shs. 28,540/- for certain building work which they had carried out. The claim was made as the balance due on two building contracts and, in the alternative, upon an account stated. The defendant, while admitting the contracts, the building construction and non-payment of the sum claimed, alleged that the work done was neither in accordance with the contracts nor in a good and workmanlike manner and that the cost of putting the work right might cost as much as Shs. 140,000/- and claimed a set-off to the extent of the plaintiffs' claim and counterclaimed the balance. The defendant also denied that there was an account stated as alleged and set up an oral agreement whereby the plaintiffs' claim was agreed at a figure "subject to a set-off and cross-claim". At the hearing the parties agreed to refer their differences to arbitration and the trial judge made an order for arbitration which provided that the award should be made within twenty-one days after service upon the two arbitrators of the order of reference, that copies of the exhibits should be released to the arbitrators and that copies of the de bene esse evidence and certain reports should be made available to them. The arbitrators were served with the order of reference on May 17 and 21, 1963, and made their award on August 13, 1963, well outside the time limited by the court. Their award assessed the cost of repairs and insufficiencies of workmanship and materials at Shs. 88,218/- but did not deal with the account stated or with the issue of terms in the contracts limiting liability raised by the pleadings. The plaintiff thereupon sought by motion to set aside and supersede the award on the grounds that the award was made after the time allowed by the court, that no evidence was taken in the arbitration, that the award was imperfect in substance as it did not amount to a decision on the matters in difference between the parties as disclosed in the pleadings for there was no decision embodying the plaintiffs' claim, and that no depositions or documents were filed with the award. It was argued on behalf of the defendant that the court had a discretionary power to and should extend the time for making the award, that the arbitrators as experts were authorised to decide the matter on their own expert knowledge and that the plaintiffs had waived their rights since they failed to move the court to set aside the award within a reasonable time after it was filed in court.

Held –

- (i) the court was not prepared to validate or remit the award; in any event, O. XLV, r. 8 had not been complied with and there was no application before the court for remission;
- (ii) there was nothing in the record to show that the arbitrators were experts, and, even if they were, it did not mean that evidence was not to be taken;

- (iii) the plaintiffs were not afforded an opportunity to be heard and there had been a denial of natural justice; consequently, misconduct on the part of the arbitrators had been established;
- (iv) the failure to file the exhibits with the award was a breach of r. 10, *ibid.*, but this in itself did not mean that the award was to be set aside;
- (v) the plaintiffs had not waived their rights; the only fact that could be imputed to them was that the arbitrators had failed to make their award in time and not that they knew that an award had been made out of time.

Award set aside and superseded.

Cases referred to in judgment:

- (1) *Das v. Ahmed* (1891), 6 Bom. 263.
- (2) *Bhagwanji Raja v. Singh*, [1962] E.A. 288 (C.A.).
- (3) *Alibhoy v. Alibhoy* (1898), 1 E.A.L.R. 4.
- (4) *Simpson v. Venkatagopalan* (1886), 1 Mad. 475.
- (5) *Raja v. Kaur* (1891), 18 I.A. 55.
- (6) *Re Browne & Collyer* (1851), L.J. Q.B. 426.
- (7) *Parkes v. Smith*, [1850] 15 Q.B. 297.
- (8) *Denton v. Strong* (1874), L.R. 9 Q.B. 117.
- (9) *May v. Harcourt* (1884), 13 Q.B.D. 688.
- (10) *Lord v. Lee* (1868), L.R. 3 Q.B. 404.
- (11) *Warner v. Powell* (1886), L.R. 3 Eq. 261.
- (12) *Knowles v. Bolton Corporation*, [1900] 2 Q.B. 253.
- (13) *Lal v. East African Builders Merchants* (1951), 13 E.A.C.A. 50.
- (14) *Ainslie v. Morrison* (1951), 18 E.A.C.A. 96.
- (15) *General Accident v. Inland Revenue Commissioner*, [1963] 1 All E.R. 618.
- (16) *Ganga Sahai v. Lekhraj Singh* (1887), 9 All. 253.
- (17) *Patel v. Mehal Singh and Another* (1956), 23 E.A.C.A. 378.

Judgment

Trevelyan J: This is an application by way of notice of motion to set aside and supersede an arbitration award.

It will be necessary to refer to a number of statutory provisions and I think it will be convenient if I now set them out.

The Kenya provisions are:

(1) Civil Procedure Act, s. 81 which provides that:

“(1) There shall be a Rules Committee . . . which shall have power to make rules not inconsistent with the provisions of this Ordinance, and subject thereto, to provide for any matters relating to the procedure of civil courts . . .”

(2) Civil Procedure Act, s. 95 which reads:

“Where any period is fixed or granted by the court for the doing of any act prescribed or allowed by this Ordinance, the court may in its discretion, from time to time, enlarge such period, even though the period originally fixed or granted may have expired.”

(3) Civil Procedure Act, s. 97 which enacts:

“Nothing in this Ordinance shall be deemed to limit or otherwise affect the inherent power of the court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court.”

(4) Order XLV of the Civil Procedure (Revised) Rules, 1948, which includes these Rules:

- “1(1) Where in any suit all the parties interested . . . agree that any matter in difference between them in such suit shall be referred to arbitration, they may . . . apply . . . to the court for an order of reference.
- (2) Every such application shall be in writing and shall state the matter sought to be referred.
- 3 (1) The court shall, by order, refer to the arbitrator the matter in difference which he is required to determine, and shall fix such time as it thinks reasonable for the making of the award, and shall specify such time in the order.
- 8 Where the arbitrators cannot complete the award within the period specified in the order, the court may, if it thinks fit, either allow further time, and from time to time, either before or after the expiration of the period fixed for the making of the award, enlarge such period; or may make an order superseding the arbitration, and in such case shall proceed with the suit.
- 10 Where an award in a suit has been made, the persons who made it shall sign it and cause it to be filed in court, together with any depositions and documents which have been taken and proved before them; and notice of the filing shall be given to the parties.
- 14 The court may remit the award or any matter referred to arbitration to the reconsideration of the same arbitrator or umpire upon such terms as it thinks fit:
 - (a) where the award has left undetermined any of the matters referred to arbitration, or where it determines any matter not referred to arbitration, unless such matter can be separated without affecting the determination of the matters referred;
 - (b) where the award is so indefinite as to be incapable of execution;
 - (c) where an objection to the legality of the award is apparent on the face of it.
- 15(1) An award remitted under paragraph 14 becomes void on failure of the arbitrator or umpire to reconsider it. But no award shall be set aside except on one of the following grounds, namely:
 - (a) corruption or misconduct of the arbitrator or umpire;
 - (b) either party having been found guilty of fraudulent concealment of any matter which he ought to have disclosed, or of wilfully misleading or deceiving the arbitrator or umpire;
 - (c) the award having been made after the issue of an order by the court superseding the arbitration and proceeding with the Suit or after the expiration of the period allowed by the Court, or being otherwise invalid.
- 18 Applications under rule 8 of this order shall be by Summons in chambers.”

(5) Order XLIX, Rule 5 which provides that:

“Where a limited time has been fixed for doing any act or taking any proceedings under these Rules, or by summary notice or by order of the Court, the Court shall have power to enlarge such time upon such terms (if any) as the justice of the case may require, and such enlargement may

be ordered although the application for the same is not made until after the expiration of the time appointed or allowed . . .”

The Indian provisions are ss. 148 and 151 of the Civil Procedure Act, 1908, and ss. 506, 514, 516, 520 and 521 of the Civil Procedure Act, 1882.

The English provisions are:

(1) Section 39 of the Civil Procedure Act, 1833, which enacts:

“That the power and authority of any arbitrator or umpire appointed by or in pursuance of any rule of court, or judge’s order, or order of Nisi Prius, in any action now brought or which shall be hereafter brought, or by or in pursuance of any submission to reference containing an agreement that such submission shall be made a rule of any of His Majesty’s courts of record, shall not be revocable by any party to such reference without leave of the court by which such rule or order shall be made, or which shall be mentioned in such submission, or by leave of a judge; and the arbitrator or umpire shall and may and is hereby required to proceed with the reference notwithstanding any such revocation, and to make such award, although the person making such revocation shall not afterwards attend the reference; and that the court or any judge thereof may from time to time enlarge the term for any such arbitrator making his award.”

(2) Section 8 of the Common Law Procedure Act, 1854, which reads:

“In any case where reference shall be made to arbitration as aforesaid the court or a judge shall have power at any time, and from time to time, to remit the matters referred, or any or either of them, to the re-consideration and re-determination of the said arbitrator, upon such terms, as to costs and otherwise, as to the said court or judge may seem proper.”

(3) Section 15 of the Common Law Procedure Act, 1854, which provides:

“The arbitrator acting under any such document or compulsory order of reference as aforesaid, or under any order referring the award back, shall make his award under his hand, and (unless such document or order respectively shall contain a different limit of time) within three months after he shall have been appointed, and shall have been called upon to act by a notice in writing from any party, but the parties may be consent in writing enlarge the term for making the award; and it shall be lawful for the superior Court of which such submission, document, or order is or may be made a rule or order, or for any Judge thereof, for good cause to be stated in the rule or order for enlargement, from time to time to enlarge the term for making the award; and if no period be stated for the enlargement in such consent or order for enlargement for one month; and in any case where an umpire shall have been appointed it shall be lawful for him to enter on the reference in lieu of the arbitrators, if the latter shall have allowed their time or their extended time to expire without making an award, or shall have delivered to any party or to the umpire a notice in writing stating that they cannot agree.”

(4) Arbitration Act, 1950, which includes these provisions:

“13(1) Subject to the provisions of sub-section (2) of section twenty-two of this Act, and anything to the contrary in the arbitration agreement, an arbitrator or umpire shall have power to make an award at any time.

(2) The time, if any, limited for making an award, whether under this Act or otherwise, may from time to time be enlarged by Order of the High Court or a judge thereof, whether that time has expired or not.

- 22(1) In all cases of reference to arbitration the High Court or a judge thereof may from time to time remit the matters referred, or any of them, to the reconsideration of the arbitrator or umpire.
- (2) Where an award is remitted, the arbitrator or umpire shall, unless the order otherwise directs, make his award within three months after the date of the order."

I would make these comments on the following provisions:

- (1) Order XLV is similar to, and based on, the provisions as to arbitration contained in the 1882 Act, the following being a comparative table:

Rule 1 (1) and (2) Section 506

Rule 8 Section 514

Rule 10 Section 516

Rule 14 Section 520

Rule 15 (1) Section 521

- (2) There are no sections in the 1882 Act in terms of ss. 148 and 151 of the 1908 Act and there are no sections in the 1908 Act in terms of ss. 506, 508, 516, 520 and 521 of the 1882 Act.
- (3) A commentary on p. 470 of Mulla's Code of Civil Procedure (12th edn.) states that s. 148 may be but a legislative recognition of the rule laid down in *Das v. Ahmed* (1) and the cases on which that rule is based. There is a further commentary on p. 476 of the same book in regard to s. 151 to the effect that where the circumstances had so required the court had on many occasions acted on the assumption of the possession of an inherent power to act ex debito justitiae and to do that real and substantial justice for the administration of which it alone existed.
- (4) Sections 148 and 151 of the 1908 Act correspond with ss. 95 and 97 of the local, respectively.
- (5) There is no provision in either Indian Code, I think, similar to Order XLIX, r. 5.
- (6) Section 13 (1) of the 1950 Act re-enacts s. 6 of the 1934 Arbitration Act and ss. 13 (2) and 22 re-enact ss. 9 and 10 of the 1889 Arbitration Act.
- (7) Section 22 of the 1950 Act has its origin in s. 8 of the 1854 Act.
- (8) English authorities do not apply to an arbitration under Order XLV without qualification: *Bhagwanji Raja v. Singh* (2) ([1962] E.A., at p. 298).
- (9) The provisions of the Kenya Arbitration Act have no relevance here.

Counsel for the plaintiff was going to hand me up the 9th edition of Mulla's work but did not do so, but I managed to get hold of O'Kinealy, J.'s The Code of Civil Procedure Act XIV OF 1882.

The plaintiffs sued the defendants for the balance due to them for certain building work which they had carried out and the defendants denied the claim and counterclaimed. Evidence de bene esse was taken from an expert witness and when the case came on for hearing, and whilst the first witness of the day was giving his evidence, the parties reached an agreement about the course that the proceedings should take. They came before the trial judge and he recorded what has been termed a consent order that the matters in difference between them as disclosed in the pleadings should be referred to arbitration as therein more particularly set forth. It was a term thereof that the award should be made within twenty-one days after the service upon the arbitrators of the order

of reference which was to be drawn up. There was a further term therein that copies of the exhibits should be released to the arbitrators and that copies of the de bene esse evidence, the reports of a Mr. Newman and a Mr. McCullough should be made available to them. A copy of the part-heard witness's evidence was not to be provided. Whether there is or is not a difference between documents being released and documents being made available to the arbitrators need not be gone into. The learned judge recorded "Consent Order as drafted approved by Nowrojee for plaintiff and Long for the defendant" and followed it with "Order is read to the parties who each approve it. Formal application to follow". The exhibits put in for the plaintiffs were released to their lawyer and those put in for the defendants were released to theirs. In due course the plaintiffs' exhibits were sent to the defendants' lawyer so that they might be transmitted to the arbitrators.

An order of reference was drawn up, providing that "the following matters in difference arising in this suit, namely matters disclosed in the pleading (sic) filed in the suit be referred for determination to two arbitrators . . . and such arbitrators are to make their award within twenty-one days of the service upon them of this Order . . ." It was served as required. At a later date the court received a consent letter from the lawyers on both sides that as one of the named arbitrators was not available as an arbitrator an amended order of reference substituting one name for another should be issued and served. This was done.

The arbitrators were served with copies of the order of reference on May 17 and 21, respectively, and they made their award on August 13, 1963, well outside the time limited by the court. They had not sought any extension of time for its making nor have they since made any application for the same.

The plaintiff claimed a sum of Shs. 28,540/- on two alternative grounds, one as the balance due on two building contracts and the other upon an account stated of May 28, 1961. There was both a defence and a counterclaim. The defence admitted the contracts, the building construction and the non-payment of the sum claimed, alleged that the work done was neither in accordance with the contracts nor in a good and workmanlike manner, claimed that the cost of putting the work right might cost as much as Shs. 140,000/- and set-off the same to the extent of the plaintiffs' claim. It denied that there was an account stated as alleged and it set up an oral agreement of the date thereof wherein the amount claimed was agreed at a figure "subject to a set-off and cross-claim by the defendant against the plaintiff". The counterclaim was for the difference between the Shs. 140,000/- and the amount of the set-off. In their reply the plaintiffs joined issue with the defendants on their defence and specifically denied the allegation of the work being bad, unworkmanlike and not in accordance with the contracts. They referred to terms in the contracts limiting their liability as to repairs. With the exception, then, of the admissions that there were the two contracts, that the amount claimed had not been paid and that the buildings were put up, all other matters raised upon the pleadings remained in difference.

The award filed was in these terms:

"We . . . as arbitrators appointed in the above suit have assessed the cost of the necessary repairs and insufficiencies of workmanship and for materials to the four blocks of flats and two blocks of outbuildings as Shs. 88,218/- (Shillings Eighty-eight thousand two hundred and eighteen)."

It is thus immediately clear that not all matters in difference were dealt with for there is at least no mention of the account stated and no mention of the issue of terms limiting liability. No evidence was taken and no documents of any kind were filed with the award.

The grounds upon which the plaintiffs rely may shortly be stated to be that:

- (a) the award was made after the time allowed by the court;
- (b) no evidence was taken in the arbitration, no opportunity being afforded to them to proffer the same;
- (c) the award is imperfect in substance as it does not amount to a decision on the matters in difference between the parties as disclosed in the pleadings for there is no decision embodying the plaintiffs' claim, and,
- (d) no depositions or documents were filed with the award.

In relation to ground (a) that the award was made out of time it is to be seen from the comments which I have made on the various provisions that no Kenya, Indian or English authority is directly in point.

I have said that the learned judge recorded a "Consent Order". With respect it is not so much an order of the court as a recording by the court of an agreement come to between the parties. It sets out what was intended to be done but it recognised that a formal application under r. 1 (2) was needed. The order required was that the case should be adjourned.

But how did the so-called order come into being? Mr. Sarup Singh (the Supreme Court clerk) tells me that he was present at the time concerned and that what happened was this. One of the advocates dictated it and the judge took it down. After it was recorded it was approved by both lawyers after which the judge called the parties into his Chambers and read over what he had recorded, Mr. Sarup Singh acting as his interpreter for them. And they approved it. The manner in which the judge recorded the matter would, I believe, lead one to think that that is what took place.

I doubt whether the court has power to enlarge the time for making the award. The judge inserted the period of twenty-one days in both orders of reference but he was only using the period which the parties themselves had agreed to. If then the "Consent Order" is an agreement between the parties and not an order or even if it is what it purports to be, the court cannot enlarge the time. In Mulla's commentary on s. 148 at p. 472 of the 12th edition of the work it is stated: "Consent Order – Where the time for doing an act has been fixed by a consent order, it cannot be enlarged except by consent". And there is no such consent here. The parties cannot rely on rules which they have ousted. But if it is to be taken that the judge must be assumed to have fixed the period in accordance with r. 3 (1) and not in accordance with the parties' consent, it makes no difference to a decision on the point for the only way that an extension of time may be granted is by Chamber Summons under r. 8 and there is none here. The court therefore has before it an invalid award, r. 15 says that an award filed out of time is invalid, and it is for setting aside.

The plaintiffs argue that the award remains valid unless and until it is set aside and that though the court has a discretion to extend the time for its making before it is made, it has no option other than to set it aside if it is made after the time allowed for its making. The defendants say that the court has a discretionary power to extend time for its making which is exercisable even where it is made after the period allowed for its making has passed and they pray in aid ss. 95 and 97, Order XLIX, r. 5 and English practice.

I will go to the authorities in a moment but I would now say that the rules do not support the defence argument. Rule 8 uses the expression "cannot complete" the award within the period allowed and not "could not" do so within the time concerned. Further, if it were in the contemplation of the rule that an enlargement of time might be granted even after the award was made it would have provided for its setting aside or for its ratification, and it does not. The whole tenor of the rule is that it governs a case

where the award has not been

made because it could not be made within the due time. And r. 15 (1) makes it clear that an award made after the period allowed by the court is invalid. But can such an invalid award be made good?

The only local decision known to me is *Alibhoy v. Alibhoy* (3). The trial judge decided that under s. 521 there was, what I will term, a validating power in the court where the award is made after it should have been but that was because art. 37 of the Order-in-Council, 1897, required the English and not the the Indian authorities to be looked at.

In India there are two cases to which I would refer. In *Simpson v. Venkatagopalan* (4), the court in its appellate jurisdiction decided that where the lower court had refused to give judgment in accordance with an award which was not returned within the period allowed, it had not failed to exercise jurisdiction for “under s. 521 of the Code of Civil Procedure, the award is invalid not having been made within the period allowed by the court”, and it pointed to the position in England being different for there the power to enlarge time depended upon express statute. I imagine that the court had in mind s. 15 of the 1854 Act which I shall shortly deal with. In *Raja v. Kaur* (5), the Privy Council set aside an award made after the time allowed for its making because under s. 521 it was invalid and the matter fell to be decided entirely on that section and ss. 508 and 514, their construction not much being aided by analogies drawn from the sections of the English Common Law Procedure Act “because a specific rule has been laid down in the Code for dealing with arbitrations, probably grounded on reasons of public policy”. But both these cases were decided on the provisions of the 1882 Code when there was not in force sections like 148 and 151 of the 1908 Code.

In England there are seven cases which I would mention, but first I would quote the learned editor of Halsbury’s Laws of England (3rd edn.) where at p. 42 of Volume 2 he says:

“Time for making the award. Except where an award is remitted by the court, when the new award must be made within three months of the order and subject to anything to the contrary in the arbitration agreement, an arbitrator or umpire has power to make an award at any time. Even where the time for making the award is limited, whether under the Act or otherwise, the High Court or a judge thereof may enlarge the time so limited whether it has expired or not”.

Then in footnote to the last part of the quotation there is a reference to the seven cases one of which was decided in 1900 and the others much earlier. I do not have the reports but I have referred to digests of them in the English and Empire Digest (Replacement Volume 2) at pp. 542 and 543. In *Re Browne & Collyer* (6), the court, utilising s. 39 of the 1833 Act enlarged the time for making an award after it was made out of time both parties having taken part in the arbitration being unaware that the allotted time had elapsed. In *Parkes v. Smith* (7), the time was also extended under the same section after the fixed period had passed. It would seem that the award had not been made in the latter case. But the cases are of no real help. *Browne’s* case (6) was perhaps dependent on peculiar circumstances and in *Parkes’s* case (7), the award was not made. In any event s. 39 is different in phraseology from the local law for it says that the court or judge may enlarge the term “for any such arbitrator making his award” which is sufficiently wide to allow the enlargement of time even after the award has been made. Three cases are on s. 15 of the 1854 Act. In *Denton v. Strong* (8), the court extended the time though the three months period of the section had passed, but the award had not at that time been made. In *May v. Harcourt* (9), an award was made after the time allowed and the court decided that it had power to extend the time nonetheless. In *Lord v. Lee* (10),

an arbitrator made his award more than three months after the submission which was ratified, but the submission had contained no time limit in it. These three cases, too, are of no great help for the power of the court or judge was wide enough to enlarge “the term for making the award” which again was wide enough to support the decisions given. In *Warner v. Powell* (11), the court utilised both s. 39 of the 1833 Act and s. 8 of the 1854 Act. Apparently the award had been made after the due time and the court enlarged it and remitted the matter back to the arbitrators. I assume that the court felt that the award was invalid but that such invalidity did not preclude the remission back. The power to remit in Kenya is governed by Order XLV, r. 14.

The last of the seven cases is *Knowles v. Bolton Corporation* (12), which has to do with the Public Health Act, 1875. It would not seem that the award had been made.

It follows, then, that not a great deal of help is to be obtained from the authorities. According to the learned editor of Russell on the Law of Arbitration (16th edn.), at p. 116, reported English cases dating from before 1889 must be treated with caution especially those relating to the conduct of the reference.

I wondered whether there could be said to be an objection to the legality of the award apparent upon the face of it because it was made out of time. Perhaps not: *Lal v. East African Builders Merchants* (13), and *Ainslie v. Morrison* (14). But I have not pursued this. The matter is dealt with specifically in r. 15.

The word “invalid” perhaps has different meanings in different contexts, but in relation to r. 15 it must surely mean of no force or effect and the Indian cases to which I referred support that, I think. Order XLIX, r. 5 does not apply for it is a general provision whilst Order XLV, r. 8 is a specific provision. Section 97 is inapplicable because there is no abuse of the process of the court to be prevented, and I do not consider that the ends of justice are in peril. What effect, however, has s. 95? I think it is wide enough to cover a case where the act has already been done. It is not limited, as r. 8 is limited. It allows the court, in its discretion, to enlarge a period allowed “for the doing of any act”. Section 81, the rule-making authority, provides for rules not inconsistent with the provisions of the Ordinance and subject thereto “to provide for any matters relating to procedure of civil courts”. As I see it, though this ruling does not need to rest upon it, s. 95 cannot be limited in extent by Order XLV. But procedurally the Order is to be observed and here r. 8 has not been complied with and there is no application before the court under r. 18. There is no application before the court for a remission.

In relation to ground (b) that no evidence was taken by the arbitrators it is common ground that no such evidence was taken by them. The plaintiffs say that this amounts to misconduct (which implies no moral turpitude) and the defendants say that no evidence was taken because the parties agreed that none should be taken. Nowhere in the consent order or in the orders of reference does it say that no evidence shall be taken. An order of reference is the court’s mandate to the arbitrators, it binds them. How could the arbitrators have known that no evidence was to be taken? I think it must be that Mr. Long or perhaps someone from his office or on his behalf told them so. As I understand it, Mr. Nowrojee sent his exhibits to Mr. Long for onward transmission to the arbitrators. If they were not told that no evidence was to be taken there has been a clear denial of natural justice. If they were so told must it not be as I have speculated? And in that case a communication was made by one party in the absence of the other. This is misconduct. Mr. Nowrojee did not authorise it. I do not for a moment suggest any impropriety in anyone.

There is an unfortunate and regrettable contest between two lawyers as to what took place. I am glad to be absolved from the embarrassing position of having to decide it. Whatever may be urged, it was impossible for the arbitrators to have complied with the order of reference without taking evidence for it provided that “the following matters in difference arising in this suit namely matters disclosed in the pleadings” should be determined by them. How could they have decided whether there was or was not an account stated of May 28, 1961, whether there was or was not an agreement of the same day and whether there was or was not a term in the contract limiting the plaintiffs’ liability without evidence and legal argument or one or other of them? True, the exhibits consisting of a bundle of correspondence, a note in a ledger, an agreement, a specification report, two plans and two letters were to be made available to the arbitrators, and perhaps it could readily be seen from the contracts whether there was or was not a limiting provision as to liability, but matters could not have been resolved save as I have mentioned. The defendants say:

“whole thing referred to arbitration, that Mr. Newman’s evidence, etc. should be given to arbitrators to look at the site and give decision. That is why it was referred to arbitration”.

Whatever the parties discussed prior to seeing the judge, their agreement was recorded, and it is to the record that we must turn to see what was to be done. What that is done there is no doubt that not one or two but the matters in difference between the parties were to be dealt with by the arbitrators. The learned judge did not record what was said to him before he recorded what he did, but if the intention was that the pleadings were to be partly abandoned why was not this dictated to him? It was of such prime importance that he could not but have made a note about it. In his affidavit Mr. Long says that he was present in court when it was agreed that “the issues in dispute” between the parties were to be referred to arbitration. There is no ambiguity there. And he goes on that it was his “clear understanding” of the agreement that no evidence should be taken. Headnote (i) to *General Accident v. Inland Revenue Commissioner* (15), reads:

“a consent order should be construed in the light of admissible evidence of surrounding circumstance but without direct evidence of the parties’ intention . . .”

In para. 5 of his affidavit Mr. Long avers that:

“the award so filed gives a quantum of workmanship, etc., as claimed in paras. 5 and 6 of the defence, set-off and counterclaim.”

And no more. What then, say, of para. 7 of the plaint? Mr. Thakkar’s affidavit is, I venture to say, out of line. Nowhere else is it suggested, and I particularly noted it in argument for I had the legal aspect in the forefront of my mind, that an agreement was come to after the consent order was recorded. Mr. Gledhill told the court:

“It was agreed to have no evidence before the order was made by Kennedy, J., not after. The original agreement was before the order of Kennedy, J., and adopted after.”

I had particularly asked just before that whether the waiver of the right to give evidence was suggested to have taken place before or after the order was recorded and that is what he said. I think that there is a mistake as to a date in Mr. Thakkar’s affidavit which refers to April 27. It may have resulted from the fact that Mr. Mehar Singh gives it in para. 4 of his affidavit. There was a consent letter of April 23, asking for an amended order of reference containing

the name of a different nominee on which an order was made on April 27 and notified by the court on April 30. If there had been an agreement entered into in April under which the parties waived the right to give evidence would it not have been notified to the court for insertion in the amended order of reference? Mr. Mehar Singh has made a positive assertion in his affidavit that:

“it was never suggested by or agreed between the advocates or between the parties that the decision of the arbitrator should be made and given without any evidence being called or taken before them”

and Mr. Nowrojee in his affidavit states this to be true from his own knowledge. If no evidence was to be taken the consent order and the orders of reference were bound to have said so. It is suggested that because the arbitrators were experts they were authorised to decide the matter on their own expert knowledge. I do not accept that. There is nothing in the record to show that they are experts, though they may very well be so in their own sphere, but even where experts are chosen, it does not mean that evidence is not to be taken. If I may say so arbitrations often, and rightly, go to particular experts but that does not mean that they must or can decide the issues without evidence. The learned editor of Russell has this to say at p. 173:

“An arbitrator must not, unless so authorised by the parties, decide upon a view or inspection of premises or goods at which they have had no opportunity to be present. But it would seem that in the case of arbitrators authorised to decide upon their own expert knowledge, such further authority might be presumed by a court.

The defendants have asked me to take evidence. Their application is based in this way. They say “We cannot go behind the order. We accept that. But we are not going behind the order. We say that whether evidence was to be taken or not is a matter of procedure and we can speak to that”. I do not accept that. As to whether evidence should or should not be taken is, in the circumstances of this case, a matter of substance and not of procedure. To admit evidence as to what the parties may have intended is inadmissible. It would allow an addition to, or a variation of, their agreement as recorded. If I am right that one or more of the three issues to which I have referred could not have been resolved without evidence or legal argument, or both, to admit evidence as to what occurred in court, would be to allow evidence setting up a different agreement. The parties could have waived their right to give evidence by so notifying the arbitrators either before or after the arbitrators got in touch with them but that did not happen. The plaintiffs were not afforded an opportunity to be heard. The evidence sought to be tendered is not admissible and misconduct on the part of the arbitrators has been established. There has been a denial of natural justice.

With regard to ground (c) that the award is imperfect in substance as it does not dispose of all the matters in difference between the parties, at p. 57 of the volume of Halsbury’s Laws of England to which I have referred, it is said:

“Thus misconduct occurs if the arbitrator or umpire, as the case may be, fails to decide all the matters which were referred to him . . .”

This contingency is, however, dealt with in Order XLV, r. 14 (a) as a ground for remitting an award so that perhaps in this country, I need not decide the point, it does not amount to misconduct, though I notice from p. 68 of O’Kinealy’s book that in his commentary on s. 521 the learned editor says: “But an award will be set aside for anything known as misconduct in English law”, for which he relies on *Ganga Sahai v. Lekhraj Singh* (16), a report not readily available to me.

As to ground (d) that no depositions or documents were filed with the award there could not have been any of the former but the exhibits were, it seems, delivered to the arbitrators and their failure to file them was in breach of r. 10. O’Kinealy is silent on the point. There is, however, a local case, *Patel v. Mehal Singh and Another* (17), where at p. 380 the court said:

“But whatever the position may be on an application to set aside an award, the first question to be decided in this appeal was whether the Supreme Court had jurisdiction in the application before it, which was not an application to set aside an award, to order the arbitrator either to supply a copy of the arbitration proceedings to the appellants or to file a copy in the Supreme Court”,

and at p. 381 there is:

“The position would be different if the application were ancillary to a pending application to set aside or remit the award.”

I believe that the mere failure to comply with r. 10 does not mean that the award is to be set aside.

It has been argued that the plaintiffs have waived their rights. I do not accept that. Waiver must, as Russell puts it on p. 165, be based on knowledge of facts. The only fact that is to be imputed to the plaintiffs is that the arbitrators had failed to make their award in due time. It cannot be imputed to them that they knew that an award was made out of time. We know that they moved quickly enough when they learned that the award was made.

I am asked to consider the equities of the matter by which I take it counsel for the defendant suggests that because no action was taken by the plaintiffs until they knew that the award was adverse to them, they did nothing. I do not think the expression “equities” is a very happy one here where we have statutory provisions but it does not matter. Assuming, as I think, that the purport of s. 95 is as wide as I have indicated, assuming also that the matter is not at an end because of the ouster of the court’s power to enlarge time and that though there is no application before the court for an enlargement of time the court may nonetheless order a remission or accept the award, I would still have to consider whether any discretion given by the section should be utilised to allow the award to be filed out of time. I have no doubt on this point at all. From the start the matter has been unsatisfactory, I need not go over all the facts again, and I would not be prepared to make the award good or to remit it.

What order of costs ought to be made? So far as this notice of motion is concerned the plaintiffs have succeeded and I see no reason to do other than to award them the costs thereof which I do. As it is not an interlocutory matter, the costs may be taxed forthwith. I have been asked to award costs on the higher scale. For reasons which I think emerge from this ruling I am not prepared so to order. So far as the proceedings before the arbitrators are concerned the matter is not so simple. They may or may not have been told by one side that no evidence was to be taken; they may or may not have decided on their own accord to resolve the matter without evidence. In all the circumstances the fairest, and I believe the proper, order is that the costs of the proceedings before them should abide a decision on the merits of the case in due course.

I set aside and supersede the award.

Award set aside and superseded.

For the plaintiffs:

J. K. Winayak & Co., Nairobi

J. K. Winayak

For the defendants:

Lawrence Long & Co., Nakuru

J. Gledhill

United Africa Press Ltd v Zaverchand K Shah
[1964] 1 EA 336 (CAN)

Division: Court of Appeal at Nairobi
Date of judgment: 3 April 1964
Case Number: 59/1962
Before: Sir Trevor Gould VP, Sir Daniel Crawshaw and Newbold JJA
Sourced by: LawAfrica
Appeal from: Supreme Court of Kenya – Miles, J.

[1] *Libel – Newspaper – Plea of justification – Standard of proof required to establish justification.*

Editor’s Summary

The respondent claimed damages for libel against the appellant company as proprietors of a newspaper. The trial judge in giving judgment for the respondent held that the allegation in the defence that the facts complained of were true in substance and fact had not been established with the degree of certainty which the law required and further held that even if the facts were required to be established on the mere balance of probabilities the evidence was inadequate. On appeal,

Held –

- (i) in the instant case a higher than normal standard of proof was required to substantiate the plea of justification;
- (ii) even if the proper standard ought not to be that of a criminal trial, it was a high one and the trial judge had not fallen into any error of substance in his approach.

Per Sir Trevor Gould, V.-P. (referring to the dictum of Denning, L.J., on “degrees of probability within a standard of proof” in *Hornal v. Neuberger Products Ltd.* (1) ([1956] 3 All E.R., at p. 973)):

“I think that what is implicit in that passage represents the trend of modern authority but I would not construe it as indicating that there may never be an overlapping of criminal and civil standards.”

Appeal dismissed.

[**Editorial Note:** This report is restricted to the observations of the court on the standard of proof.]

Cases referred to in judgment:

- (1) *Hornal v. Neuberger Products Ltd.*, [1956] 3 All E.R. 470.

- (2) *Wilmott v. Harmer* (1839), 173 E.R. 678.
- (3) *Chalmers v. Schackell* (1834), 172 E.R. 1326.
- (4) *Thurtell v. Beaumont* (1824), 130 E.R. 136.
- (5) *Doe d. Devine v. Wilson* (1855), 14 E.R. 581.
- (6) *Cooper v. Slade* (1858), 10 E.R. 1488.
- (7) *Hurst v. Evans*, [1917] 1 K.B. 352, [1916] All E.R. Rep. 975.
- (8) *Bater v. Bater*, [1950] 2 All E.R. 458.
- (9) *H. H. Ilanga v. M. Manyoke*, [1916] E.A. 705 (C.A.).

The following judgments were read:

Judgment

Sir Daniel Crawshaw JA: [The judge first dealt with certain grounds of appeal and then continued:]

The defence alleged that the statements of fact contained in the article were anyway true. The learned judge considered the evidence in some detail. As to onus he said:

“The onus of proof of a plea to justification is dealt with in Halsbury’s Laws of England (3rd edn., Vol. 24), at p. 47:

‘If the statement complained of imparts the commission by the plaintiff of a criminal offence, the defendant, to succeed in his plea of justification, must prove the commission of the offence charged as strictly as if the plaintiff was being prosecuted for the offence.’

As previously mentioned this was a case where the plaintiff was accused in the article of a criminal offence. Can it be said that the evidence establishes this beyond reasonable doubt?”

As to the allegations of violence the learned judge said:

“Reviewing the evidence as a whole I am unable to say that the defendants have established that the words complained of were true in substance and in fact with the degree of certainty which the law requires. Even if the allegation of assault were required to be established on the mere balance of probabilities the evidence would be inadequate.”

As to the alleged efforts of the respondent to get Lalji to vacate the premises, the judge said he was not satisfied that the latter had been harassed. On issue (4) he held that the words complained of were neither true in substance nor in fact and that the defence of justification failed.

If the learned judge was entitled to find, as he did, that even on the balance of probabilities the evidence was insufficient to establish the allegation of assault, it is not strictly necessary for this court to consider whether he was correct in saying that the proper standard of proof was that in a criminal case. That that is the standard has, however, been strongly challenged by counsel for the appellant, and perhaps I should express my view on it.

Counsel for the appellant submits that the extract from Halsbury cited by the judge is incorrect. In Gatley at p. 597 it is said:

“Where the libel charges a criminal offence, the defendant to succeed in his plea of justification must (it is submitted) prove the commission of the offence charged as strictly as if the plaintiff was being tried on indictment, i.e. beyond a reasonable doubt. The authorities, however, are not unanimous that this particularity of proof is required.”

In *Willmet v. Harmer* (2), the plea was one of justification to a libel charging the plaintiff with bigamy. Lord Denman, C.J., directed the jury that the same strictness of proof was required to establish justification as would be required to convict on a criminal trial for bigamy. A similar direction was given in *Chalmers v. Shackell* (3) where justification was pleaded to an alleged libel charging the plaintiff with forging and uttering. Tindal, C.J., said in addressing the jury:

“we cannot consider the plea in any other way, or on any other kind of evidence than if we were trying the plaintiff for the offence alleged in it.”

In *Thurtell v. Beaumont* (4), on a claim against an insurance company for loss by fire, the defence was that the plaintiff had “wilfully” set fire to the premises. The judge said that in order to find a verdict against the plaintiff the jury ought to be satisfied that the crime imputed to him was as fully proved as would justify them in finding him guilty of a criminal charge for the same offence. This direction was approved on appeal.

Counsel for the appellant leans heavily on the case of *Doe d. Devine v. Wilson* (5), which of course if applicable is binding on us. In that case the defendants gave evidence of the death of the witnesses who, it was alleged,

attested the signature of a party, also dead, to deeds of lease and re-lease, and offered proof of their handwriting. The plaintiff alleged that the signatures were all forged. The trial judge directed the jury that they must try the question whether they were forged in the same manner as on a trial for forgery. Their Lordships of the Privy Council said that the trial judge appeared to have in fact shifted the onus from the defendants, who asserted the deed, to the plaintiff. So long as the onus remained on the defendants the usual standard of proof in a civil case, that is on the balance of probabilities, would clearly pertain. Their Lordships said:

“ . . . In a civil case the *onus* of proving the genuineness of a deed is cast upon the party who produces it, and asserts its validity. If there be conflicting evidence as to the genuineness, either by reason of alleged forgery, or otherwise, the party asserting the deed must satisfy the jury that it is genuine. The jury must weight the conflicting evidence, consider all the probabilities of the case, not excluding the ordinary presumption of innocence, and must determine the question according to the balance of those probabilities. In a criminal case the *onus* of proving the forgery is cast on the prosecutor who asserts it, and unless he can satisfy the jury that the instrument is forged to the exclusion of reasonable doubt, the prisoner must be acquitted.”

This part of their Lordships judgment would appear to raise a distinction according to where the onus of proof lay. The judgment went on to say, however:

“If indeed, by the pleadings in a civil case, a direct issue of forgery or not be raised, the *onus* would lie on the party asserting the forgery, and this would be more like a criminal proceeding, but even then the reasons for suffering a doubt to prevail against the probabilities, would not, in their Lordships’ opinion, apply.”

This certainly is not easy to reconcile with the earlier decisions to which I have referred.

In *Cooper v. Slade* (6), the question was whether an election candidate by offering to pay the travelling expenses of voters did so on the understanding that they would vote for him; if so, it constituted a particular statutory form of bribery. The standard of proof, as such, does not appear to have been made an issue in the case; of the eight justices of appeal who delivered individual judgments, only two, I think, commented on it. Lord Cranworth ((1858), 10 E.R., at p. 1505) said it was correct that the jurors should be told that they must be “satisfied” that the candidate was offering an inducement. At p. 1498, Willes, J., when dealing with the question which had been put before them whether there was any evidence for the jury that the libellous letter had been sent with the authority of the candidate, said it was improbable in the circumstances that the candidate would offer to pay the expenses of a person to vote against him and that it was for the jurors to say which was the more probable and rational view. He then went on to refer to “the elementary proposition that in civil cases the preponderance of probability may constitute sufficient ground for a verdict”.

Counsel for the appellant referred to *Hurst v. Evans* (7), where the plaintiff claimed under an insurance policy for loss by theft. The insurance company pleaded the dishonesty of one of the plaintiff’s servants. Lush, J., the trial judge, considered the case of *Thurtell v. Beaumont* (4) and distinguished it under the different terms of the two policies and where the onus lay. He said:

“I do not think that the evidence in a civil case must necessarily be the same as in a criminal case arising out of the same matter.”

Bater v. Bater (8), was referred to by both counsel. It related to a petition for divorce on the grounds of cruelty. It was held by the Court of Appeal that the commissioner had been right in saying that the petitioner must prove her case “beyond reasonable doubt”. Denning, L.J. (as he then was) said:

“It is true that by our law there is a higher standard of proof in criminal cases than in civil cases, but this is subject to the qualification that there is no absolute standard in either case. In criminal cases the charge must be proved beyond reasonable doubt, but there may be degrees of proof within that standard. Many great judges have said that, in proportion as the crime is enormous, so ought the proof to be clear. So also in civil cases. The case may be proved by a preponderance of probability, but there may be degrees of probability within that standard. The degree depends on the subject-matter. A civil court when considering a charge of fraud, will naturally require a higher degree of probability than that which it would require if considering whether negligence were established. It does not adopt so high a degree as a criminal court, even when it is considering a charge of a criminal nature, but still it does require a degree of probability which is commensurate with the occasion.”

The learned judge then gave his views on the elastic meaning of the words “reasonable doubt” and said ([1950] 2 All E.R., at p. 460):

“If the commissioner had, however, put the case higher and said that the case had to be proved with the same strictness as a crime is proved in a criminal court, then he would, I think have misdirected himself.”

Counsel for the respondent appeared to accept the views of Denning, L.J., to the extent of conceding that Halsbury (*supra*) went too far in the standard of proof required.

The *Bater* case (8) was referred to by this court in *H. H. Ilanga v. M. Manyoka* (9). Sir Kenneth O'Connor, P., in his judgment (with which the other members of the court agreed) said ([1961] E.A., at p. 712F):

“The onus of proving the taking was on the plaintiff/respondent. A high standard of proof – comparable to that required in a case of civil fraud – was required to substantiate an allegation of the removal, in circumstances which could amount to theft, of a large sum of money – Shs. 12,000/- – from a house within the respondent’s close. The learned judge did not, apparently, appreciate that there were gradations of the standard of proof in civil cases and applied a standard which was inappropriate to the circumstances of this case.”

I am certainly not prepared to say that the decision of this court was *per incuriam*, and that one should construe the Privy Council case of *Doe d. Devine* (5) as deciding that in every civil action of whatever nature the standard of proof is always the same, being that of the preponderance of probabilities. At the same time more recent authorities do suggest that in the earlier cases of *Willmet v. Harmer* (2) and *Chalmers v. Schackell* (3) (*supra*) may have expressed the standard required in too strict terms, although they were, of course, dealing only with the particular circumstances there involved.

In the instant case it seems to me that a higher than normal standard of proof was required to substantiate the plea of justification. As I have said, the learned judge went into the evidence in some considerable detail. He commented on the manner in which certain of the witnesses gave their evidence. He compared some of the evidence with the evidence given by some of the witnesses in a private prosecution instituted by the respondent against Lalji and his wife, in which they were charged with assault arising out of the same incident, but

were acquitted. The matter is one of credibility and I cannot say that the learned judge erred in the way he tested it, or in the conclusions at which he arrived; it is not a question whether one would necessarily have come to the same conclusions oneself. As I read his judgment, his method of assessing credibility was on the preponderance of probability as to where the truth lay, testing it as he did. As I have indicated, even if the proper standard ought not to be that of a criminal trial, in my opinion it is a high one and I do not find that the learned judge fell into any error of substance in his approach.

Sir Trevor Gould VP: [After dealing with one of the grounds of appeal the judge continued:]

The other important point of law which arises is whether the learned judge erred in accepting as correct the statement from Halsbury's Laws of England (3rd edn., Vol. 24), at p. 47, to the effect that a defendant seeking to justify a libel imputing the commission of a criminal offence must prove the commission of the offence as strictly as would be necessary in a criminal prosecution. I agree with Crawshaw, J.A., that this point is not essential to the decision of the appeal as the learned judge said that even on a mere balance of probabilities he found the evidence inadequate, and I see no reason to interfere with his finding on that basis. On the question of law, however, I agree with what has been said by Crawshaw, J.A. It is true that the view expressed in Halsbury (*supra*) has the support of the decision in *Willmet v. Harmer* (2) and *Chalmers v. Schackell* (3), which are cases directly in point, in that they related to justification of libels of the kind in question. The cases which support a contrary view relate to other matters. It may well be urged that a man does not have to accuse another of having committed a crime and if he does so he ought to be prepared to prove the truth of his assertion with complete strictness. It ought not to be enough to show that a plaintiff probably committed a crime. On the other hand there is a great divergence in the gravity of acts classed as crimes (a simple assault can hardly be compared to a rape) with a corresponding divergence in the gravity of allegations of crime.

The authorities have been set out by Crawshaw, J.A., in his judgment. I would only add that what was said by Denning, L.J., in *Bater v. Bater* (8) ([1950] 2 All E.R., at p. 459) was approved by Hodson, L.J., in *Hornal v. Neuberger Products Ltd.* (1) ([1956] 3 All E.R., at p. 975) and in the same case Denning, L.J., also said, at p. 973:

"The more serious the allegation the higher the degree of probability required; but it need not in a civil case reach the very high standard required by the criminal law."

I think that what is implicit in that passage represents the trend of modern authority but I would not construe it as indicating that there may never be an overlapping of criminal and civil standards. In my opinion there might well be circumstances in a civil action and there might be a charge of a crime so heinous that a judge would be amply justified in demanding its proof by such a preponderance of probability as would suffice to discharge the onus in at least some types of criminal prosecutions.

In the present case I agree that a higher standard of proof was required than a bare preponderance of probabilities and generally, that nothing less than clear evidence should suffice to establish an allegation of crime in justification of a libel.

Newbold JA: On the question of the standard of proof, the case of *Ilanga v. Manyoka* (9) is clear authority for saying that within the standard of

proof requisite in civil cases there are gradations dependent on the nature of the allegation; and I agree entirely with what Gould, V.-P., has said on this question.

Appeal dismissed.

For the appellant:

P. M. Makwana, Nairobi

D. N. Khanna and *C. S. Moraes*

For the defendant:

E. P. Nowrojee and *V. V. Patel*, Nairobi

Sajile Salemulu and another v Republic [1964] 1 EA 341 (HCT)

Division:	High Court of Tanganyika at Dar-es-Salaam
Date of judgment:	19 December 1963
Case Number:	666 and 668/1963
Before:	Biron Spry and Reide JJ
Sourced by:	LawAfrica

[1] *Criminal law – Sentence – Minimum sentence – Whether prescribed minimum sentence applies to first offenders only.*

[2] *Criminal law – Compensation – Stock theft – Theft by several criminals – Insufficient evidence showing what property each criminal obtained – Compensation mandatory – Liability of each criminal to pay compensation – Minimum Sentences Act, 1963, s. 6 (T.).*

Editor's Summary

The appellants, with two others, were convicted by a magistrate of jointly stealing cattle. The two others and the first appellant were first offenders and were each sentenced to three years' imprisonment and twenty-four strokes as the mandatory minimum prescribed by the Minimum Sentences Act, 1963, whereas the second appellant who admitted a previous conviction for stock theft was sentenced to four years and twenty-four strokes. In sentencing him the magistrate remarked: "This is not the first time that he has stolen cattle." Upon appeal by the first appellant against his conviction and by the second appellant against both conviction and sentence, the substantial issues were whether the magistrate was right in holding in effect that the prescribed minimum sentence applied to first offenders only and in adding another year's imprisonment solely on account of one previous conviction; whether the appellate court could make the mandatory order for compensation under s. 6, *ibid.*, and, if so, whether there was

sufficient material on the record to enable it to do so. By s. 6 it is mandatory on a court to make an order for compensation where property has been obtained by a convicted offender in respect of a scheduled offence, which stock theft is and the evidence in the lower court was that thirty-five head of cattle were stolen from the complainant and that subsequently a total of twenty-seven (plus four calves born since the theft) were found in varying numbers in, or to have emanated from, the possession of the four accused, but it was not possible to say how many each accused actually obtained for himself or the value thereof. It was argued on behalf of the Republic that compensation could be determined and awarded in the same way as liability for the offence and that where several persons are convicted all are jointly and severally liable.

Held –

- (i) since the Minimum Sentences Act, 1963, it is manifestly wrong to increase a sentence merely because the offender has a previous conviction as in effect the offender is being punished twice for the same offence which is unjustifiable;

- (ii) a previous conviction is not ipso facto such an aggravation as to justify a more severe penalty if, but for the previous conviction, the prescribed minimum penalty would have been considered adequate;
- (iii) the Act does not say that a minimum sentence is only to be imposed in cases where the greatest leniency would otherwise have been shown and that in all other cases sentences greater than the minimum must be imposed;
- (iv) if the court concludes that a convicted person has actually obtained some property as a result of the commission of the offence an order for compensation should be made under s. 6;
- (v) (Reide, J., dissenting) since it was not clear what each criminal obtained, apart from the property which was recovered, there would be no order for compensation nor a direction to the lower court to do so.

Appeals against conviction dismissed. Appeal of second appellant against sentence allowed. Sentence of three years' imprisonment and twenty-four strokes substituted. No order for compensation made.

Cases referred to in Judgment:

- (1) *Tanganyika High Court Criminal Appeal No. 646 of 1963* (unreported).
- (2) *Tanganyika High Court Criminal Appeal No. 651 of 1963* (unreported).
- (3) *R. v. Reeves*, The Times, November 20th, 1963.

The following judgments were read:

Biron J: The two appellants, who in the lower court were respectively the third and fourth accused, which descriptions are being retained in this judgment, were convicted together with two other accused, of jointly stealing cattle and were sentenced, the third accused to imprisonment for three years and twenty-four strokes corporal punishment, and the fourth accused to imprisonment for four years and twenty-four strokes corporal punishment. They are now appealing and their appeals are consolidated. The first and second accused have not appealed.

The case as set up by the prosecution was to the effect that thirty-seven out of forty-four head of the complainant's cattle were stolen whilst grazing in the bush on June 20. Subsequently cattle to a total of twenty-seven (plus four calves born since the theft) were found in varying numbers in, or to have emanated from, the possession of the four accused.

On arraignment the first accused pleaded guilty and he was convicted on his own plea. The other three pleaded not guilty and the case against them proceeded to trial. During the course of the trial the second accused changed his plea to one of guilty and he too was convicted on his own plea. Likewise in the course of the trial, but at a very much later stage, the fourth accused changed his plea to one of guilty and he also was convicted on his own plea. The third accused persisted in maintaining his innocence and he was convicted after the trial and sentenced to imprisonment for three years and twenty-four strokes.

I propose to deal with the appeal of the fourth accused first. As already noted, he changed his plea at a very late stage of the trial. His plea as recorded reads:

"I wish to change my plea. I did steal these cattle and drove them to Ukinga area. Some I sold but some I had not sold when I was arrested. I stole them from Luka Romano at Manda Mwambeli."

It is not easy to imagine a more unequivocal plea of guilty. Apart from the fact that the fourth accused was very properly convicted on his own plea, the

evidence adduced fully supports and establishes, as stated by the fourth accused himself in his plea, that he had sold some of the stolen cattle and others were found in his possession. Therefore, apart from the fact that his appeal from the conviction is incompetent as he unequivocally pleaded guilty, it is also utterly devoid of merit. I would have no hesitation in dismissing it.

With regard to the third accused, evidence was given by the complainant to the effect that two head of his cattle were found in the third accused's house and that two others were recovered from the people who had bought them from the third accused. An assistant jumbe, Simon (P.W.2), stated that he bought a cow and a calf from the third accused, which cow was subsequently identified by the complainant as one of the stolen ones. A third witness Tupinyeri (P.W.3), stated that the third accused brought to him two cows and a calf and asked him to look after them for him as they were breaking up his cattle boma. These were later identified by the complainant as his. And a police constable who was in charge of the investigation of the theft (P.W.6), stated that the third accused, together with the fourth accused, claimed the cattle they had sold as theirs. In the face of this overwhelming evidence, when given the opportunity of making his defence, the third accused chose to stay silent and he called no witness.

In his petition of appeal the third accused admits that stolen cattle were found in his possession, but asserts that they had been brought to him by the fourth accused. The evidence, to my mind, fully supports the learned magistrate's finding that:

"the third accused was a member of this gang of cattle raiders and that he both helped to steal and to dispose of these thirty-seven head of cattle."

The sentence imposed on the third accused was the mandatory minimum one under the Minimum Sentences Act, 1963, and therefore not subject to appeal. I would therefore dismiss his appeal in its entirety.

In sentencing the accused the learned magistrate stated:

"This was a large well planned cattle theft. Nevertheless I take into account the previous good records of the first three accd., and the frankness of the 1st, 2nd, and 4th accd.

1st accd. All receive the minimum sentence of Three years and twenty four strokes."

2nd accd.

3rd accd.

4th accd. This is not the first time that he has stolen cattle. Four years and twenty-four strokes."

The fourth accused had admitted to a previous conviction for cattle theft, when he was sentenced to imprisonment for eight months.

It is apparent that the learned magistrate distinguished between the first three accused and the fourth accused in imposing a much stiffer sentence on him, on account of his previous conviction. One is tempted to ask whether, but for the accused's frankness, which the learned magistrate took into consideration, the learned magistrate would have imposed a still greater sentence than the prescribed minimum, solely on account of this single previous conviction.

The learned magistrate in applying the Minimum Sentences Act is obviously construing the Act as

laying down the minimum sentence for first offenders only. In so construing the Act the learned magistrate is not wanting in company. In the judgment in Tanganyika High Court Criminal Appeal, No. 646 of 1963, I remarked:

“In general, the learned magistrate concerned would appear to construe the Minimum Sentences Act as laying down the minimum sentences for

first offenders only, for one offence only, and, at least in so far as cattle are concerned, for the minimum quantity which can be stolen. Thus, in *Iringa Criminal Case No. 428 of 1963* (High Court Criminal Appeal No. 483 of 1963), the learned magistrate stated in sentencing the accused, who was a first offender:

‘Two head of cattle were stolen. I think it is proper therefore, to award a sentence above the minimum. Accused will go to prison for three and a half years and will receive twenty-four strokes.’

In *Iringa Criminal Case No. 454 of 1963* (High Court Criminal Appeal No. 651 of 1963), where the accused admitted a previous conviction for cattle theft, the learned magistrate stated:

‘Sentence: As accused has a previous conviction for cattle theft in 1960 I think it proper he shall be treated more severely than a first offender. He will go to prison for three years and nine months.’

Like learned State Attorney, I fail to comprehend how the learned magistrate can so construe the Minimum Sentences Act. There is not the slightest justification for such a harsh and unwarranted construction.”

Counsel for the Director of Public Prosecutions, and to whom the court is indebted for his assistance if not convinced by his submissions, on this issue and on that of compensation, to be dealt with, supported the sentence imposed on the fourth accused and submitted *inter alia*:

“My general proposition is that the magistrate is not wrong, although I am not suggesting I would have passed that sentence if I had been the magistrate. The question before your Lordships is, is the sentence manifestly excessive? And my submission is, the Legislature having made clear its intention that the minimum sentence for this sort of offence is to be three years and twenty-four strokes, the magistrate cannot be said to be wrong if he inflicts on the offender an extra year’s imprisonment, bearing in mind that this offender has a previous conviction for exactly the same sort of offence some two years previously.”

With respect, the question put to learned State Attorney was not whether the sentence is manifestly excessive, but whether the learned magistrate erred in principle, the principle applied being that the prescribed minimum sentence applies to first offenders only and a court is justified in adding another year’s imprisonment solely on account of a solitary previous conviction.

In taking the course he did, the learned magistrate was following the usual and general practice of distinguishing between first offenders and previously convicted offenders. Before the Minimum Sentences Act came into force it was almost, if not altogether, the invariable practice to impose stiffer sentences on previously convicted offenders than on first offenders, and still is the case on non-scheduled offences. In adhering to such practice in this instant case, the learned magistrate has applied the prescribed minimum sentence to first offenders and has accordingly stepped up the sentence on a previously convicted one. Whilst such practice was proper in the result, as the law stood before the passing of the Minimum Sentences Act and still is on non-scheduled offences, it is manifestly wrong to increase a sentence merely because the offender has a previous conviction, as in effect the offender is thus being punished twice for the same offence, which is unjustifiable. True, in the case of an old confirmed offender and recidivist, the court imposes a very stiff sentence on account of his record; it does not however do so as extra punishment on account of the previous convictions, but because such record establishes that the offender is a confirmed criminal and menace to society, so he must be put away for a long time in the interests of, and as a protection to, society. But such considerations

do not apply where, as in this case, the offender has but a single conviction. In such case an offender is not given a more severe sentence on account of his conviction, but a first offender is given a more lenient sentence on account of his clean record. In other words, the first offender is dealt with leniently on account of his clean record, but such leniency is withheld from previously convicted offenders.

In assessing the appropriate sentence, the chief determining factor is the offence itself. Where there is no prescribed minimum or maximum penalty, the court has complete discretion as to what sentence it considers appropriate. Where there is a prescribed maximum and minimum, the court's discretion as to what is the appropriate penalty is limited to the range between the two extremes. The prescribed minimum penalty is the appropriate one where there are no aggravating features. And even where there are aggravating features, the prescribed minimum penalty may still be adequate. But a previous conviction ipso facto is not such an aggravating feature justifying a more severe penalty, if but for the previous conviction the prescribed minimum penalty would have been considered adequate.

One of the cases referred to in the appeal case above cited, was that of Tanganyika High Court Criminal Appeal No. 651 of 1963 (2). This appeal was subsequently heard by my brother Spry, the case had come before me when I admitted it to appeal. In his judgment Spry, J., said:

"The learned Director of Public Prosecutions conceded that the sentence was severe but, as a matter of principle, he argued that the enactment of the Minimum Sentences Act, 1963 (No. 29 of 1963), indicated that the legislature took a serious view of offences of this nature and meant that there should be a general upgrading of sentences in respect of such offences.

With respect, I cannot agree. A penal statute must be enacted strictly and I see no justification for reading into the Act anything beyond what is clearly expressed, that is, that it imposed minimum sentences. It certainly does not say that the minimum sentence is only to be imposed in cases where the greatest leniency would otherwise have been shown and that in all other cases sentences greater than the minimum must be imposed.

In my view, the Act makes no difference to the manner in which a magistrate should approach the question of sentence. He should consider the essential gravity of the offence, take into account any aggravating or mitigating circumstances and decide on the appropriate sentence. If the appropriate sentence is less than the statutory minimum, he must then impose the latter; if not, he should impose the sentence he considers appropriate. In other words, the Act only affects the sentence to be passed where a sentence less than the statutory minimum would otherwise have been imposed."

With respect, I agree with the conclusion reached by my brother Spry that the Act "certainly does not say that a minimum sentence is only to be imposed in cases where the greatest leniency would otherwise have been shown and that in all other cases sentences greater than the minimum must be imposed". But with greater respect, I cannot subscribe to the view that:

"The Act makes no difference to the manner in which a magistrate should approach the question of sentence. He should consider the essential gravity of the offence, take into account any aggravating or mitigating circumstances, and decide on the appropriate sentence. If the appropriate sentence is less than the statutory minimum he must then impose the latter. If not, he should then impose the sentence he considers appropriate."

Punishments and penalties are prescribed by Parliament, not by the courts. Where Parliament has prescribed a specific penalty for a specific offence, that penalty is the appropriate punishment for that offence. And it is not open to a court to consider whether such penalty is appropriate, let alone say that a lesser punishment is appropriate. But that is a far cry from saying that the prescribed penalty is, in the words of SPRY, J., “only to be imposed in cases where the greatest leniency would otherwise have been shown and that in all other cases sentences greater than the minimum must be imposed”.

Although the learned magistrate has erred in principle in imposing the severer sentence on the fourth accused, even so, if the sentence is nonetheless appropriate in relation to the offence, an appellate court would not be justified in interfering with the sentence solely on account of the court having erred in principle. In this instant case however, apart from any question as to whether the sentence in itself is manifestly excessive there is a further consideration impugning the propriety of the sentence, which cannot be disregarded by this court in determining whether the sentence should be allowed to stand. The learned magistrate expressly stated that he was imposing a stiffer sentence on account of the previous conviction, and this has been made a specific ground of appeal from the sentence. Therefore, the principle that not only should justice be done but should manifestly and undoubtedly be seen to be done, is relevant and material. In connection with the application of this principle by an appellate court to sentence, it is not irrelevant to note a recent case before the Court of Appeal. Although on the facts that case can be distinguished from this, it affords an illustration of the application of the principle to sentence by an appellate court. In *R. v. Reeves* (3) as under:

“The Lord Chief Justice, giving the judgment of the Court, said that in June, 1963, twenty pitch fibre pipes were delivered to the appellant’s yard by two men. The appellant put the pipes among other articles in the yard. The appellant contended that the cheque for £12 which he handed to one of the men was a loan. In spite of the appellant’s good character it was difficult to say that a sentence of nine months for receiving erred in principle. But that was not the whole story. The other two men, one of whom was a thief and the other a receiver, were tried summarily and fined £25, while the appellant, who elected to go for trial, received nine months. The fact that one co-defendant received a lenient sentence would not have the effect of reducing another’s sentence to the same amount, but, at the same time, where the difference between sentences was extreme, as in the present case, justice was not seen to be done. This was another case where the court’s hand was forced by the ludicrously lenient sentences imposed by justices. A fine of £25 for a receiver who had a previous conviction for receiving was out of touch with reality. The court felt that the appellant, who had served some three months of his sentence, ought to be discharged. The court, treating the application as the appeal, would set aside the sentence of nine months’ imprisonment and substitute such a sentence as would allow the appellant to be discharged today.”

I would therefore allow the appeal of the fourth accused against sentence and reduce it to that of imprisonment for three years and twenty-four strokes corporal punishment, the same sentence as awarded to the other three accused, particularly as the learned magistrate has taken the fourth accused’s frankness into consideration.

By s. 6 of the Minimum Sentences Act, it is mandatory on a court to make an order for compensation where property has been obtained by a convicted offender in respect of a scheduled offence. No order for compensation has been made in this case. It is therefore necessary to consider firstly, whether this court

can make such order, and, if it has the power to do so, whether there is sufficient material on the record to enable the court to make an order. With regard to the first question, I have no doubt that this court has power to make such order for compensation, provided that there is sufficient material before it, as in such case the court of first instance is in no better position than this court. The answer to the second question, whether there is sufficient material before the court, to my mind, depends on the interpretation of s. 6 of the Act. In the case of one convicted offender only, the section presents no difficulty, but where, as in this case, there is a number of offenders convicted at a joint trial, the application and construction of the section present considerable difficulty. Counsel for the respondent has submitted that the section is capable of two alternative constructions being put on it. The first is that liability for compensation is determined in the same way as liability for the offence and that where a number of persons are convicted and property obtained, each offender is jointly and severally liable in compensation. The other construction is that each individual offender is liable only to the extent of the property, or rather the value of the property, actually obtained by him; that is, to the extent of the benefit he received. Counsel submitted that the first construction, which he canvassed, is the correct one.

Apart from the fact that the section expressly refers to s. 176 of the Criminal Procedure Code, the section in the Act must be read in conjunction with s. 176 of the Criminal Procedure Code as being a later enactment dealing with the same subject matter, that is, compensation. It is both desirable and necessary to set out the two sections in full, in order that they may be compared and distinguished. Section 176 reads:

- “(1) When an accused person is convicted by any court of any offence not punishable with death and it appears from the evidence that some other person, whether or not he is the prosecutor or a witness in the case, has suffered material loss or personal injury in consequence of the offence committed and that substantial compensation is, in the opinion of the court, recoverable by that person by civil suit, such court may, in its discretion and in addition to any other lawful punishment order the convicted person to pay to that other person such compensation, in kind or in money, as the court deems fair and reasonable:

Provided that in no case shall the amount or value of the compensation awarded exceed two thousand shillings.

- (2) When any person is convicted of any offence under Chapters XXVI to XXXI, both inclusive, of the Penal Code, the power conferred by subsection (1) shall be deemed to include a power to award compensation to any bona fide purchaser of any property in relation to which the offence was committed for the loss of such property if the same is restored to the possession of the person entitled thereto.
- (3) Any order for compensation under this section shall be subject to appeal if an order for the payment of a fine of a similar amount would have been subject to appeal and no payment of compensation shall be made before the period allowed for presenting the appeal has elapsed or, if an appeal be presented, before the decision of the appeal.”

Section 6 of the Act reads:

- “(1) Notwithstanding the provisions of section 176 of the Criminal Procedure Code, where a court convicts any person of a scheduled offence the court shall, if it is of opinion that such person has obtained any property as a result of the commission of that offence and that the owner of the property can be identified, order that the person convicted shall pay to the

owner of the property compensation equal to the value of the property as assessed by the court.

- (2) Notwithstanding the provisions of section 177 of the Criminal Procedure Code, compensation order under subsection (1) shall be recoverable by the person to whom the same is payable as if it were a civil debt.”

Both sections deal with compensation, as distinct from restitution, which is provided for in ss. 179 and 180 of the Criminal Procedure Code. The obvious differences between the two sections can briefly be summarised as follows:

Under s. 176 of the Code compensation, is:

- (a) not limited to any specific offences;
- (b) discretionary;
- (c) limited in value to Shs. 2,000/-;
- (d) recovery is as provided for in s. 177 of the Criminal Procedure Code.

Under s. 6 of the Act compensation is:

- (a) limited to scheduled offences;
- (b) mandatory;
- (c) unlimited in value;
- (d) recoverable as a civil debt.

To my mind, an equally obvious distinction is, the different approaches to, and the different angles from which, compensation is dealt with. The approach under s. 176 of the Code is from the angle of the victim, that:

“... it appears from the evidence that some other person, whether or not he is the prosecutor or a witness in the case, has suffered material loss or personal injury in consequence of the offence committed”, etc.

The court is concerned with compensating the victim, any victim, not necessarily the complainant, anybody, even a bona fide purchaser, who has suffered loss or personal injury in consequence of the offence. And liability is determined as in a civil case:

“... that substantial compensation is, in the opinion of the court, recoverable by that person by civil suit.”

That is, liability corresponds to that of joint tortfeasors, who are jointly and severally liable.

Under s. 6 of the Act the approach is from the angle of the convicted offender:

“... where a court convicts any person of a scheduled offence the court shall, if it is of opinion that such person has obtained any property as a result of the commission of that offence”, etc.

The section is concerned, as is the whole Act, with offenders in respect of scheduled offences. The Act as a whole steps up the penalties for scheduled offences and the section makes it mandatory on the court, where property has been obtained, to order compensation; that the offender does not receive any benefit from the offence but is made to disgorge or, as succinctly put by counsel for the respondent, “The court has to say, ‘What did he get out of this?’” The mandatory order for compensation is not alternative to the discretionary order which can be made under s. 176 of the Code, but is supplementary to it, making it incumbent on the court to ensure that the convicted offender derives no benefit from the offence.

This distinction between the two enactments, s. 176 of the Code and s. 6 of the Act, is, to my mind, so obvious that I find it difficult to comprehend how the proposition that liability for compensation under s.

6 corresponds with

criminal liability for the offence, can be put forward, let alone canvassed and sustained. If the sole object of s. 6 of the Act was to make mandatory what was discretionary under s. 176 of the Code and liability is determined in the same manner as under the Code, it appears fantastic that the Legislature should have expressed itself in such completely different language.

I propose to consider the wording of s. 6 of the Act piecemeal. “. . . *the court shall, if it is of opinion.*” Such language is altogether alien to the determination of liability as for criminal liability. It cannot, I think, be gainsaid that to be of opinion, is a much lower standard than to be satisfied beyond reasonable doubt, which is the standard postulated in the determination of criminal liability. To continue, “. . . *that such person has obtained any property.*” To construe obtaining as meaning any convicted person where property has been obtained in the commission of the offence, which, as illustrated by learned State Attorney, would include “the person who kept cave” and to be consistent, should include any person who counsels or procures the commission of the offence, who, by s. 22 of the Penal Code, is a principal, is, to my mind, with respect, to ignore the intention of the Legislature and disregard the legislation as enacted. Criminal liability is not dependent on any obtaining. It is determined by what the law considers to be participation in the offence as principals. The words “as a result of the commission of that offence”, according to this view of liability, are not only superfluous but misleading.

The optimum application by the courts of a statutory enactment, is to give effect to the intention of the Legislature. The intention of the Legislature here, is, to my mind, perfectly clear. But however clear an intention may be the court can only give effect to it strictly within the four walls of the wording of the enactment, particularly in the case of a penal provision, as is this instant one. Giving the wording of the section its plain and ordinary meaning, which is the cardinal canon of construction, the section, to my mind, means that a court must make an order for compensation where it is of the opinion that a convicted offender has actually obtained some property as a result of the commission of the offence, and the amount of compensation in so far as the individual offender is concerned, is limited to the value of the property actually obtained by that offender. To make such an order the court need not be satisfied beyond reasonable doubt as to the property actually obtained by an individual offender, or its value. It is sufficient if it is so of opinion. Adopting such standard which is so much lower than the usual standard in criminal matters, where there is a number of offenders who have each obtained property, a court, to my mind, would be entitled to assume, in the absence of any evidence to the contrary, that they each obtained an equal share, whether on the principle of honour amongst thieves or equality is equity.

Although unequal numbers of cattle were actually found in the possession of the accused, there is nothing to displace the presumption that the division was, or was to be, equal. In his plea the second accused said, “. . . we then divided the cattle amongst ourselves”. The specific number found in the possession of each accused is not indicative of his ultimate share. In at least one instance two accused were engaged in selling the same animals. Altogether ten head of cattle are missing. I would therefore hold that each of the four accused should be liable in compensation to the value of two and a half head. The difficulty, however, is to find such value. The value of the thirty-seven head stolen, as given in the charge sheet, is Shs. 9,250/-. The complainant in his evidence gave the value of these thirty-seven head as Shs. 11,000/- and the assistant jumbe stated that he bought a cow and calf for Shs. 200/-. It is therefore impossible to form an opinion as to the value of the missing cattle from the record, and it is more than doubtful whether the trial court would be in any better position to value the missing cattle even if additional evidence were taken. I therefore

would refrain from making an order for compensation, or directing the district court to do so, but would leave the complainant to his civil remedy.

Spry J: I have had the advantage of reading the judgment which has just been delivered by Biron, J., and as I am substantially in agreement with the opinions he has expressed, I can deal briefly with most of the points arising on these appeals.

So far as these appeals are against conviction, I respectfully agree that they must be dismissed, and have nothing to add.

As regards the sentences, it is clear that the appeal of the third accused cannot succeed, since the sentence imposed was the statutory minimum. The position of the fourth accused is different, since he was sentenced to four years' imprisonment carrying with it the statutory corporal punishment. I agree with Biron, J., that if the learned magistrate intended to say that because the accused had a previous conviction he must receive a sentence greater than the statutory minimum, that would amount to a misdirection. I am, however, doubtful whether that is what the learned magistrate intended. He said: "This is not the first time that he has stolen cattle." I think he may have meant "and therefore I do not think I should show any leniency". That would, of course, be unexceptionable.

If there was no misdirection, the only question is whether the sentence was manifestly excessive. This was a raid in which a large number of cattle was taken and removed to a great distance; on the other hand, there is no indication of organization (in this respect, I think the learned magistrate misdirected himself), there was no breaking into any boma and there is nothing to suggest that the thieves were armed. The sentence was undoubtedly very severe, but for my part I do not think it can be said to be manifestly excessive. I would, therefore, dismiss the appeal of the fourth accused against sentence.

As regards s. 6 of the Minimum Sentences Act, 1963 (No. 29 of 1963), I respectfully agree that in a proper case this court could, when exercising its appellate or revisional jurisdiction, make an order for compensation. I agree also that an order under s. 6 can only be made if the court is able to conclude that an accused person has actually, personally, obtained some property as a result of the commission of the offence. Where I differ, with respect, from my learned brother, is that I can see no justification for introducing any presumption of equality in the case of joint offenders. I do not think the idea of "honour among thieves", even if it has any substance, which I doubt, is relevant, because criminals taking part in a joint enterprise may well and in fact I think often do, agree to an unequal division, reflecting the several parts played by the criminals in the planning and execution of the crime. Nor can I see any justification for introducing doctrines of equity.

Again, I cannot accept the proposition advanced by counsel for the respondent that all the participants in the crime must be regarded for the purposes of s. 6 as having jointly obtained the property stolen. Apart from any other consideration, this would deprive of all meaning the words in s. 6 "if it is of opinion that such person has obtained . . .". If all the criminals were to be regarded as having obtained joint possession of the property stolen, there would be no need for the court to form any opinion in the matter, and the order would automatically follow.

This leads to the further question, whether the words "has obtained" connote possession by the accused at the time when the making of an order is considered. In my view, they must, with this qualification, that I think a person who has parted with stolen property but derived benefit from it must be regarded constructively as in possession of it. On the other hand, if one of a gang of thieves

asports all the stolen property and subsequently shares it with the other members of the gang, he is only to be regarded as having obtained the share he retained.

In my view, if the magistrate, applying his mind judicially, can say “I am of opinion that this man obtained this, and that man obtained that”, he must proceed to make an order for compensation against each. If he cannot say that, he cannot make an order. This would not lead to any failure of justice, because if no order for compensation can be made either under s. 6 of the Minimum Sentences Act, 1963, or under s. 176 of the Criminal Procedure Code, the aggrieved person still has his civil remedy. In the present case it was clearly impossible to say what any of the criminals individually obtained, apart from the property which was recovered, which obviously cannot be the subject of an order for compensation. I would therefore agree with Biron, J., although for a different reason, that no order under s. 6 should be made in this case, nor should the matter be referred back to the lower court.

Reide J: I have had the advantage of reading the judgments of Biron and Spry, JJ., and respectfully agree as regards the appeals of both appellants against conviction and of the third accused against sentence, and have nothing to add.

As regards the fourth accused’s appeal against sentence, I agree with my brother judges that for a court to find that an offender with a relevant previous conviction should receive a sentence greater than the statutory minimum sentence solely because of that conviction, would be a misdirection. The learned magistrate’s remark in this case in passing sentence: “This is not the first time that he has stolen cattle”, was however in itself perfectly proper and relevant, though it might have been better had he gone on to explain the reasons for the sentence which he awarded. However, I see no reason to suppose that the learned magistrate did not arrive at his estimate of an adequate sentence by a proper and judicial consideration of the relevant facts. As to the quantum of that sentence, it is true that the theft was not accompanied with violence and that there was armed, but remembering that this was a cattle raid by a gang of men, and bearing in mind the considerable number of cattle stolen, I cannot say that the sentence was manifestly excessive, and I would therefore dismiss the appeal against sentence.

I have the misfortune to differ from my learned brothers in their several constructions of s. 6 of the Minimum Sentences Act. The wording of the section is admittedly not as clear as it might be, and presents obvious difficulties of interpretation.

As I understand it, the question which this court has to deal with in this case in considering compensation, is the interpretation of the word “obtained” in the phrase “obtained any property”. Biron, J., has construed it as including the meaning “actually obtained”, and Spry, J., takes a somewhat similar line in saying that an order under s. 6 can be made only if the court is able to conclude that an accused person has “actually personally obtained” property. I will not myself attempt any exhaustive or general definition of the phrase “obtained any property”, but will say at once that in this particular case I would support the interpretation which learned State Attorney has canvassed, that is, that all the participants in the theft itself must be regarded for the purposes of the section as having jointly obtained the property stolen.

It appears to me that “obtained any property” means no more and no less than “has had possession of any property”. When a thing is stolen, the thief, at the moment of asportation, acquires a legal (though not a lawful) possession of it (or what learned State Attorney has called a “criminal possession”), and unlawful possession at the moment of asportation is an essential ingredient of the crime of theft. In my view, all persons who are jointly convicted of the

theft itself thus necessarily have such possession in contemplation of law at that moment, and have “obtained the property” within the meaning of s. 6. For these reasons I do not concern myself, in this case at any rate, with distinguishing between “actual” or “personal” obtaining and “obtaining” simpliciter. It follows from this that in my view it is irrelevant to consider the subsequent history and disposition of the stolen property where all the accused have been found jointly guilty of its theft, or whether the accused or some of them may at some later date have divested themselves of their possession.

In the instant case the learned magistrate found in accordance with his judgment on the third accused and the pleas of the other accused persons, that all of them had taken part in a joint raid and stolen all the cattle. Accordingly I am not concerned here to interpret or define the words “if it [i.e., the court] is of opinion”. I do not wish to be understood to say that those words may not call for interpretation in certain cases, but in the instant case the question does not seem to me to arise, since if a court finds, as, on my reading of the law, it necessarily did here, that the accused persons were in possession of the cattle, then a fortiori it was of that opinion. Nor, with great respect, can I associate myself with the view of SPRY, J., that the words “has obtained” should be construed as connoting possession by the accused at the time when the making of an order is to be considered, or that a conception of constructive possession is required for the interpretation of s. 6, since, for the reasons I have given, I am of opinion that liability by a thief to pay compensation is incurred at the moment of asportation.

I turn to the question of the assessment of the value of the ten head of cattle not recovered in this case. With great respect, I agree with Spry, J., that I can see no justification for introducing any presumption of equality or of “honour among thieves” to enable a court to assume, as Biron, J., has suggested, in the absence of any evidence to the contrary, that each of a number of thieves has obtained an equal share of the proceeds of the theft; although on my construction of the section that question does not arise in any case.

Both my brother judges, although for different reasons, are of opinion that no order for compensation under s. 6 should be made: Biron, J., because in his view it would be impossible on the evidence now to hand and only doubtfully possible if additional evidence were taken, for a court to arrive at an estimate as to the value of the missing cattle; Spry, J., because in his view it is impossible to say what cattle any of the accused men “obtained” within the meaning of that word in s. 6. My own view is that the order for compensation being mandatory, the trial court should now be required to assess the value of the missing cattle to the best of its ability, if necessary by taking further evidence, and that orders for compensation (recoverable as provided by s. 6 (2)) for the value of the missing cattle so assessed, should then be made against each of the accused persons. I do not think that the fact that such an assessment might be difficult and not exact, should preclude or relieve a court from its duty to make it. However, since both my brother judges are of opinion that no compensation should be ordered, my view will not prevail.

Appeals against conviction dismissed. Appeal of second appellant against sentence allowed. Sentence of three years imprisonment and twenty-four strokes substituted. No order for compensation made.

The appellants did not appear and were not represented.

For the respondent:

The Attorney-General, Tanganyika

M. G. K. Konstam (State Attorney, Tanganyika)

Republic v Mohamedi Naweka
[1964] 1 EA 353 (HCT)

Division: High Court of Tanganyika at Dar-es-Salaam
Date of judgment: 20 March 1964
Case Number: 44/1964
Before: Sir Ralph Windham CJ, Law and Spry JJ
Sourced by: LawAfrica

(Consolidated with Criminal Appeal No. 79 of 1964.)

[1] Criminal law – Sentence – Statutory minimum sentence – Mens rea – Receiving stolen property – Property received stolen during burglary – Receiver not aware that property so stolen – sentence imposed under Minimum Sentences Act, 1963 – Whether necessary to prove accused knew or ought to have known that property so stolen.

Editor's Summary

The accused was convicted pursuant to s. 311 (1) of the Penal Code of receiving stolen property and was sentenced to two years' imprisonment and twenty four strokes of corporal punishment as prescribed by s. 5 (2) of the Minimum Sentences Act, 1963, which is the minimum prescribed upon a conviction of receiving or retaining stolen property contrary to s. 311 (1) of the Penal Code where the property is stolen in the course of the commission of one of the offences mentioned in Part I of the Schedule to the Act. At the trial it was proved that the property received by the accused had been stolen in the course of a burglary and that the accused knew or had reason to believe that the property had been stolen, but it was not proved that the accused knew or had reason to believe that it had been stolen in the course of a burglary. In revision the point in issue was whether the magistrate was entitled to impose the minimum sentence prescribed under the Minimum Sentences Act when the prosecution had not proved that the accused knew that the property received by him was stolen in the course of a burglary.

Held –

- (i) for the purpose of invoking s. 5 (2) of the Minimum Sentences Act, 1963, in a case where an accused has been convicted of receiving stolen property contrary to s. 311 (1) of the Penal Code, the prosecution must prove that the accused knew or ought to have known that the property had been feloniously stolen, taken, extorted, obtained or disposed of, but need not prove that the accused knew or ought to have known that the thing stolen had been stolen in the commission of any one of the offences set out in Part I of the Schedule to the Act;
- (ii) where an accused is convicted of receiving stolen property contrary to s. 311 (1) of the Penal Code, if the property stolen is the property of the Government or other bodies mentioned in item 3 of Part I of the Schedule to the Minimum Sentences Act, 1963, then it is not necessary, for the purpose of invoking s. 5 (2) of the Act, for the prosecution to prove that the accused knew or ought to have

known that the thief knew that the property stolen was the property of the Government or of such other bodies; *Republic v. Athumani* (1), doubted.

- (iii) the magistrate was correct in imposing the minimum sentence as required by the Minimum Sentences Act, 1963, and there was no cause to interfere with that sentence.

Appeal dismissed.

Cases referred to in judgment:

- (1) *Republic v. Athumani*, Tanganyika High Court Criminal Revision No. 299 of 1963 (unreported).

- (2) *Lim Chin Aik v. R.*, [1963] 1 All E.R. 223.
- (3) *Sherras v. De Rutzen*, [1895] 1 Q.B. 918; [1895] All E.R. Rep. 1167.
- (4) *R. v. Cugallere*, [1961] 2 All E.R. 343.
- (5) *R. v. Tolson* (1889), 23 Q.B.D. 168.
- (6) *R. v. Prince* (1875), L.R. 2 C.C.R. 154.
- (7) *Brent v. Wood* (1946), 62 T.L.R. 462.
- (8) *Alli Selimani v. Republic*, Tanganyika High Court Criminal Appeal No. 46 of 1964 (unreported).

Judgment

Sir Ralph Windham CJ, read the following judgment of the court:

This matter comes before us in revision, the main question for determination being whether the accused, who was found guilty of the offence of receiving stolen property, was rightly sentenced by the trial magistrate to the statutory minimum sentence of two years' imprisonment, carrying with it twenty-four strokes of corporal punishment, prescribed by s. 5 (2) of the Minimum Sentences Act, 1963, in respect of "the offences contained in Part I of the Schedule hereto." Whether the accused was proved to have been guilty of one of the offences so set out involves a consideration of the nature and degree of mens rea which it lies upon the prosecution to establish in order to bring within Part I of that Schedule an accused person whose offence was the receiving of stolen property contrary to s. 311 (1) of the Penal Code.

Before considering this question, it will be convenient to limit the scope of our judgment by stating that, upon the evidence, the record and the judgment of the court below, we are satisfied on three points: first, that the conviction for receiving stolen property contrary to s. 311 (1) was justified; it will therefore stand: secondly, that the property in question was proved to have been stolen in the course of the commission of a burglary: thirdly, that while it was proved (as it was of course essential to prove in order to justify the conviction under s. 311) that the accused knew or had reason to believe that the property had been stolen, it was not proved that he knew or had reason to believe that it had been stolen in the course of the commission of a burglary.

The items of Part I of the Schedule to the Minimum Sentences Act, 1963, which are directly relevant to this case are items 5 and 6A. But it will be helpful to set out all the items up to and including item 6A. They read as follows:

- "1. stealing by a person in the public service contrary to ss. 265 and 270 of the Penal Code (Cap. 16);
- 2. stealing by a servant contrary to ss. 265 and 271 of the Penal Code where the offender is a person employed by a city council, municipal council, town council or district council or by a trade union registered under the Trade Unions Ordinance (Cap. 381), a co-operative society registered under the Co-operative Societies Ordinance (Cap. 211), a political party, a missionary society or a charity;
- 3. theft contrary to s. 265 of the Penal Code where the offender knew or ought to have known that the thing stolen is the property of the Government, a city council, municipal council, town council or district council or of a trade union registered under the Trade Unions Ordinance (Cap. 381), a co-operative society registered under the Co-operative Societies Ordinance (Cap. 211), a political party, a missionary society or a charity;

4. robbery contrary to s. 286 of the Penal Code;
5. housebreaking or burglary contrary to s. 294 of the Penal Code;

6. breaking into a building and committing a felony therein or breaking out of a building having committed a felony therein contrary to s. 296 of the Penal Code;
- 6A. receiving or retaining stolen property contrary to s. 311 (1) of the Penal Code where the property was stolen in the course of the commission of one of the offences mentioned in Items 1 to 6 (inclusive) of this Part or Item 1 of Part II of this Schedule.”

The brief but important point for our decision, for the purpose of disposing of this case, is whether there should be read into item 6A a requirement that the accused must be shown to have known (or to have had reason to believe) not only that the property had been stolen, but that it had been stolen in the course of committing one of the offences mentioned in items 1 to 6 inclusive; in the present case item 5, which covers housebreaking and burglary. In short, the question is whether in item 6A, between the words “where” and “the property was stolen . . .”, there should be read by implication the words “the offender knew or ought to have known that . . .”. It will be observed that similar words appear in item 3, in respect of a thief; and it is arguable that, for the purpose of being brought within Part I of the Schedule and thereby being subjected to harsher penalties, a receiver ought not to be placed in a worse position as regards his guilty knowledge than the legislature has placed a thief, and that the omission from item 6A of words similar to those in item 3 was probably an oversight and ought to be remedied by an implied reading of similar words into item 6A, upon the general principles regarding mens rea.

At first sight such a contention appears to be an unsound one. The words of a statute must ordinarily be construed to mean what they say, and no more. And the very fact that item 6A does not contain words with respect to a receiver’s guilty knowledge similar to those in item 3 with respect to that of a thief seems rather to imply that the legislature deliberately intended to treat a receiver more harshly than a thief. But we are confronted with a recent judgment of this court to the contrary, *Republic v. Athumani* (1), where Biron, J., in a judgment which, just as in the present case, was concerned more particularly with items 6A and 5 of Part I of the Schedule, but which dealt at length with the question of the mens rea to be required of a receiver under item 6A when read together with any of the other items from 1 to 6 inclusive, held that in order to bring an accused person within item 6A and such other item, it must be shown that the receiver knew or ought to have known not merely that the property in question had been stolen, but that it had been stolen in the commission of the offence set out in that particular other item.

In so holding, Biron, J., reached his conclusion on two grounds. First, he adopted the line of reasoning which we have already considered briefly, namely that there is no good ground for distinguishing between the treatment of a thief in item 3 and that of a receiver in item 6A, and that the position of the latter ought therefore to be equated to that of the former, notwithstanding the difference in wording between the two items. The paragraph in his judgment in which he reaches this conclusion reads as follows:

“As will be noted in Item 3, the thief can only be convicted of the scheduled offence set out therein if he knew or ought to have known that the thing stolen was the property of the Government or of the other bodies set out therein. It therefore follows that a receiver of such property cannot be convicted of the scheduled offence of receiving unless and until it is first established that the thief who stole the property knew or ought to have known that the property was that of the Government or other relevant body or society. To hold that the receiver in such case can be convicted of the scheduled offence although he had no knowledge as to whence the

property emanated, once it has been established that the thief had such guilty knowledge (which is an indispensable ingredient), would, to my mind, be making an unwarranted distinction between the thief and the receiver. Why should the thief be in a better position than the receiver?"

With respect, the short answer to the question so posed by the learned judge. as we see it, is that the legislature, by the very words it used, chose (no doubt with good reason) to put the thief in a better position than the receiver, and that where the words of a statute are unequivocal it is not for the judicature to redress what it may consider to be an unfair balance.

Furthermore, we are impressed by the submission of the learned Director of Public Prosecutions, who has argued this case before us, that item 6A of Part I of the Schedule to the Minimum Sentences Act, 1963, does not create any new offence; nor does it modify the ingredients of any existing offence by adding to it a higher degree of guilty knowledge than is at present required in proof of it. Item 6A simply provides that the existing offence of receiving stolen property, which already possesses as one of its essential constituents a prescribed element of mens rea, shall in certain circumstances only, which circumstances are expressed to relate to the history of the stolen goods and not to the receiver's knowledge of that history, be punishable with a minimum penalty. Therefore, as the learned Director of Public Prosecutions rightly points out, it is not competent for a court to assume the functions of the legislature by in effect reading into the clear provisions of the item words importing an additional kind of guilty knowledge which the legislature has seen fit not to include. For the sake of clarity we would state that we construe items 6A and 3, when read together, to mean that, if an accused person has been convicted of receiving stolen property contrary to s. 311 (1) of the Penal Code, and if it is sought to show that the property was stolen in the course of the commission of the offence mentioned in item 3, then it is incumbent on the prosecution to have proved two things only in relation to guilty knowledge: first, of course, that the receiver knew or had reason to believe that it had been feloniously stolen, taken, extorted, obtained or disposed of, this being the requirement of s. 311 (1) itself and the necessary pre-requisite to conviction under that section: and secondly, that the *thief* (i.e. the "offender" under item 3) knew or ought to have known that the thing stolen was the property of the Government or other body mentioned in item 3. It is not necessary, in our view, to prove either that the receiver knew, or that he knew that the thief knew, that the thing stolen was the property of the Government or other such body.

The existence already of an element of guilty knowledge in the offence of receiving stolen goods, namely the knowledge or the having reason to believe that they were stolen, brings us to the second ground on which Biron, J., based his conclusion. This ground, which he developed at considerable length in his judgment, was that it was in accord with the principles regarding mens rea expounded in a number of well known English decisions, culminating in *Lim Chin Aik v. R.* (2), in which several of the earlier authorities were reviewed. Now with the greatest respect we fully accept the propositions of law as laid down in those English decisions, in particular in the passages from them which are set out in the judgment of Biron, J. But not one of those cases in which an accused was held not guilty for want of mens rea, was concerned with a situation such as exists in the present case, where the accused, although he may not have had some particular kind or degree of guilty knowledge, nevertheless knew when he did the act in question that he was committing a crime. In every one of those cases, whether the defence was based on a mistake of fact or otherwise, the position was that the accused, when he did the act, did not know that he was doing a wrong thing at all.

And the doctrine of mens rea, does not extend beyond such cases. In the absence of special statutory provision with regard to mens rea or guilty knowledge in respect of any particular offence, whether by making such offence one of absolute liability on the one hand or by specifically requiring some kind of guilty knowledge on the other, the only degree of mens rea that has ever been held to be a pre-requisite to an accused person's guilt is that he shall have known, or shall have had good reason for knowing, that he was doing something which was criminal, or which was at least unlawful. In no reported case, so far as we are aware, has it ever been held that mens rea means more than this. In particular, it has never been held that, in the absence of such specific statutory provision as we have mentioned, an accused person is not guilty of a particular offence through absence of mens rea, on the ground that although he knew that he was doing an illegal act, he did not know that he was committing the particular offence with which he was charged, or did not know that he was committing it in specified aggravating circumstances rendering him liable to an enhanced penalty. This, as we see it, is the factor which, with respect, distinguishes the present case from all those English cases relied on in the judgment of Biron, J., and brings it outside the scope of the sound and salutary propositions regarding mens rea which they lay down.

Lim Chin Aik v. R. (2) itself (supra) for instance, was a case of a prohibited immigrant who was convicted of entering Singapore in contravention of the order prohibiting his entry. His conviction was quashed on the ground that the order had never been served on him and that he had no knowledge of it. He was thus unaware that he was doing anything wrong at all, and acted without any guilty mind or mens rea in the proper sense of the expression. Similarly, in *Sherras v. De Rutzen* (3), and in *R. v. Cugullere* (4), the doctrine of mens rea was applied so as to justify the court in reading the word "knowingly" into the definitions of the offences for which the accused person had in each case been respectively convicted, because without it the accused in each case might have been convicted, and indeed was convicted until his conviction was quashed on appeal, for doing an act in all innocence, the offence in neither case being one to which the legislature could be held to have attached absolute liability either expressly or by necessary implication. The position regarding mens rea in cases of bigamy is the same. In *R. v. Tolson* (5), it was held that notwithstanding the strict words of the charging statute, "Whoever, being married, shall marry any other person during the life of the former husband or wife shall be guilty . . .", the accused was not guilty because she believed honestly and on reasonable grounds that her former husband was dead when she re-married. Here again the decision, based on the necessity for mens rea, was reached because the accused was unaware that she was doing anything wrong at all when she re-married.

The true meaning and scope of the expression mens rea, namely a general guilty knowledge or intention on an accused person's part, rather than an intention to commit the particular crime with which he is being charged or a knowledge that he is committing that crime, is not only recognised in the authorities to which we have referred and in all those upon which Biron, J., relied, but it is made explicit in such definitions or paraphrases of the expression mens rea as are contained in some of these and other cases. It is, for instance, recognised and acted upon in the leading case of *R. v. Prince* (6), where ((1875), L.R. 2 C.C.R., at pp. 169-170) Brett, J., albeit in a dissenting judgment, defined mens rea lucidly in terms which were accepted and acted upon by the remainder of the court in confirming the appellant's conviction. He said:

"Upon all the cases I think it is proved that there can be no conviction for crime in England in the absence of a criminal mind or mens rea. Then comes the question, what is the true meaning of the phrase. I do not doubt

that it exists where the prisoner knowingly does acts which would constitute a crime if the result were as he anticipated, but in which the result may not improbably end by bringing the offence within a more serious class of crime. As if a man strikes with a dangerous weapon, with intent to do grievous bodily harm, and kills, the results makes the crime murder. The prisoner has run the risk. So, if a prisoner do the prohibited acts, without caring to consider what the truth is as to facts, as if a prisoner were to abduct a girl under sixteen without caring to consider whether she was in truth under sixteen, he runs the risk.

So if he without abduction defiles a girl who is in fact under ten years old, with a belief that she is between ten and twelve. If the facts were as he believed he would be committing the lesser crime. Then he runs the risk of his crime resulting in the greater crime. It is clear that ignorance of the law does not excuse. It seems to me to follow that the maxim as to mens rea applies whenever the facts which are present to the prisoner's mind, and which he has reasonable ground to believe, and does believe to be the facts, would, if true, make his acts no criminal offence at all."

Again, in *Sherras v. De Rutzen* (3) (supra), Wright, J., in a passage ((1895), 1 Q.B., at p. 921) quoted in the judgment of Biron, J., says:

"There is a presumption that mens rea, an evil intention, or a knowledge of the wrongfulness of the act, is an essential ingredient of every offence . . ."

This again recognises that if the accused, in doing the act, intends to do some evil or knows that his act is in some way wrongful, that is enough to satisfy the requirement of mens rea. Lord Goddard, in *Brent v. Wood* (7) ((1946), 62 T.L.R., at p. 463) describes mens rea in equally broad terms as simply "a guilty mind", while in *Lim Chin Aik* (2) (supra) it is described at p. 227 as "a guilty intent".

The accused in the present case had such a guilty mind or guilty intent, in that he received the stolen goods knowing or having reason to believe that they were stolen. Whether he knew or had reason to believe that they had been stolen in the commission of a burglary goes beyond any general requirement of the law regarding the necessity for mens rea; nor, as we have said, does anything in the Minimum Sentences Act, 1963, make it necessary to prove any such additional kind of guilty knowledge in order to bring this accused within item 6A read together with item 5, or indeed any accused within item 6A read together with any of the other items from 1 to 6 inclusive, of Part I of the Schedule to that Act. On these grounds we find ourselves, with respect, unable to adopt the reasoning and conclusion reached by our brother Biron, J., in *Republic v. Athumani* (1) (supra) which we note was recently followed by Methven, Ag. J., in *Alli Selimani v. Republic* (8), and since we agree with the trial magistrate that there were no special circumstances present which would have empowered him under s. 5(2)(c) of the Act to impose less than the statutory minimum sentence which he did impose, we see no cause to interfere with that sentence.

Appeal dismissed.

For the Republic:

The Director of Public Prosecutions, Tanganyika

H. W. Chitepo (Director of Public Prosecutions, Tanganyika)

The accused/appellant did not appear and was not represented.

Hilton v Hilton

[1964] 1 EA 359 (SCK)

Division: Supreme Court of Kenya at Nairobi
Date of judgment: 22 June 1964
Case Number: 9/1964
Before: Rudd J
Sourced by: LawAfrica

[1] Divorce – Jurisdiction – Self-governing dominion – Colonial divorce jurisdiction – Whether colonial jurisdiction conferred by statute continues after attainment of independence – Kenya Independence Act, 1963, s. 7 (1).

Editor's Summary

A petition for dissolution of a marriage under the Indian and Colonial Divorce Jurisdiction Act, 1926, was filed after Kenya gained its independence, namely, after December 12, 1963. At the hearing of the petition a preliminary issue was considered whether after Kenya had attained independence the Supreme Court of Kenya had jurisdiction to entertain proceedings under the Act. The Act was applied to the Colony of Kenya by the Kenya Divorce Jurisdiction Order in Council, 1928, and s. 7 (1) of the Kenya Independence Act, 1963, provides that after December 12, 1963, no court having jurisdiction under the law of Kenya or any part thereof shall by virtue of the Colonial and Other Territories (Divorce Jurisdiction) Acts, 1926 to 1950, have jurisdiction to make a decree for the dissolution of marriage, unless proceedings for the decree were instituted before December 12, 1963.

Held – by virtue of s. 7 (1) of the Kenya Independence Act, 1963, the Supreme Court of Kenya has no jurisdiction to entertain a divorce petition filed under the Indian and Colonial Divorce Jurisdiction Act, 1926, unless the proceedings for the decree have been instituted before December 12, 1963.

Petition dismissed.

Cases referred to in judgment:

(1) *Partington v. Partington*, [1962] E.A. 579 (T.).

Judgment

Rudd J: These proceedings are proceedings for divorce and they were not instituted until after December 12, 1963. The parties are domiciled in England, and at the present time this court has jurisdiction only to the extent that jurisdiction exists under the Indian and Colonial Divorce Jurisdiction Act, 1926, which was applied to the Colony of Kenya by the Kenya Divorce Jurisdiction Order in Council, 1928. A similar Order in Council was also made applying this Act to the Protectorate of Kenya, but the present jurisdiction, if it exists at all, under these two Orders in Council, is virtually the same and, therefore, in this judgment I shall confine myself to considering the position in connection with the application of the Act to what was the Colony of Kenya. The effect of this Act and the Orders in Council

applying it to Kenya was to empower this court, in certain circumstances, to grant what is in effect virtually an English divorce on the same grounds as such a divorce could be obtained in England if the proceedings were brought before a competent court in that country. That is still undoubtedly the position as regards proceedings brought in Kenya for divorce under that Act where the proceedings were instituted before December 12, 1963. It is in question as to whether in this court has any jurisdiction to entertain proceedings under that Act, whereas in this case the proceedings were not instituted before December 12, 1963. That question was argued as a preliminary point of law in this case, and this judgment is the court's ruling upon that point.

The Act of 1926 applied originally to India directly and without the necessity of any Order in Council. The Act further provided that it could be extended to any part of His Majesty's Dominions other than the self-governing Dominions (as therein defined) by means of an Order in Council. The Kenya Divorce Jurisdiction Order in Council, 1928, was such an Order in Council which applied the Act to the Colony of Kenya, and it was made expressly under the powers conferred by s. 2 of the Act of 1926. This Act was also applied to Tanganyika by Order in Council before that country attained its independence. When India and later Tanganyika attained independent status the continued application of the Act of 1926 was the subject of special provision in the Acts passed by the Westminster Parliament.

In the case of India, this was done by s. 17 of the Indian Independence Act, 1947, which reads as follows:

- “(1) No court in either of the new Dominions shall, by virtue of the Indian and Colonial Divorce Jurisdiction Acts, 1926 and 1940, have jurisdiction in or in relation to any proceedings for a decree for the dissolution of a marriage, unless those proceedings were instituted before the appointed day, but, save as aforesaid and subject to any provision to the contrary which may hereafter be made by any Act of the Parliament of the United Kingdom or by any law of the Legislature of the new Dominion concerned, all courts in the new Dominions shall have the same jurisdiction under the said Acts as they would have had if this Act had not been passed.
- (2) Any rules made on or after the appointed day under subsection (4) of section one of the Indian and Colonial Divorce Jurisdiction Act, 1926, for a court in either of the new Dominions shall, instead of being made by the Secretary of State with the concurrence of the Lord Chancellor, be made by such authority as may be determined by the law of the Dominion concerned, and so much of the said subsections and of any rules in force thereunder immediately before the appointed day as require the approval of the Lord Chancellor to the nomination for any purpose of any judges of any such court shall cease to have effect.
- (3) The reference in subsection (1) of this section to proceedings for a decree for the dissolution of a marriage include reference to proceedings for such a decree of presumption of death and dissolution of a marriage as is authorised by section eight of the Matrimonial Causes Act, 1937.
- (4) Nothing in this section affects any court outside the new Dominions, and the power conferred by section two of the Indian and Colonial Divorce Jurisdiction Act, 1926, to apply certain provisions of that Act to other parts of His Majesty's Dominions as they apply to India shall be deemed to be power to apply those provisions as they would have applied to India if this Act had not passed.”

When Tanganyika attained independence quite a different form of legislation was adopted to deal with the matter in the Tanganyika Independence Act, 1961, which contained no provision in the terms of or analogous to s. 17, sub-s. (1) of the Indian Independence Act. Instead, the Tanganyika Independence Act, 1961, dealt with the matter under item 15 of the Second Schedule thereto, which reads as follows:

“Divorce jurisdiction

In subsection (2) of section two of the Indian and Colonial Divorce Jurisdiction Act, 1926 (which enables section one of that Act to be extended to certain countries, but not to any of the countries named in the subsection

- (2) the word 'and' shall be omitted in the last place where it occurs and at the end there shall be added the words 'and Tanganyika'."

The effect of this amendment was to take away the power of applying the Act to Tanganyika by Order in Council after this amendment.

In the case of Independence of Kenya the matter was dealt with in the Kenya Independence Act, 1963, which was enacted by the Parliament at Westminster on December 3, 1963, to make provision for and in connection with the attainment by Kenya of fully responsible status within the Commonwealth.

For the remainder of this judgment I shall refer to this Act as the Independence Act, wherein it was provided by sub-ss. (1) and (2) of s. 1, as follows:

- "1.(1) On and after 12th December, 1963 (in this Act referred to as 'the appointed day') Her Majesty's Government in the United Kingdom shall have no responsibility for the government of Kenya or any part thereof.
- (2) No Act of the Parliament of the United Kingdom passed on or after the appointed day shall extend, or be deemed to extend, to Kenya, or any part of Kenya, as part of the law thereof; and on and after that day the provisions of Schedule 1 to this Act shall have effect with respect to legislative powers in Kenya."

and it was further provided by s. 7 as follows:

- "7.(1) On and after the appointed day no court having jurisdiction under the law of Kenya or any part thereof shall, by virtue of the Colonial and Other Territories (Divorce Jurisdiction) Acts, 1926 to 1950, have jurisdiction to make a decree for the dissolution of a marriage, or as incidental thereto to make an order as to any matter, unless proceedings for the decree were instituted before the appointed day.
- (2) Except as provided by the foregoing subsection, and subject to any provision to the contrary which may be made on or after the appointed day by or under any law made by any legislature established for Kenya or any part thereof, all courts having jurisdiction under the law of Kenya or any part thereof shall on and after that day have the same jurisdiction under the said Acts as they would have had if this Act had not been passed.
- (3) Any rules made on or after the appointed day under section 1 (4) of the Indian and Colonial Divorce Jurisdiction Act, 1926 for a court having jurisdiction under the law of Kenya or any part thereof shall, instead of being made by the Secretary of State with the concurrence of the Lord Chancellor, be made by such authority as may be determined by the law of Kenya, and so much of the said section 1 (4) and of any rules in force thereunder as requires the approval of the Lord Chancellor to the nomination for any purpose of any judges of any such court shall cease to have effect.
- (3) The reference in subsection (1) of this section to proceedings for the dissolution of a marriage include references to proceedings for such a decree of presumption of death and dissolution of marriage as is authorised by section 16 of the Matrimonial Causes Act, 1950."

The Kenya Independence Order in Council, 1963, was made on December 4, 1963, and came into operation immediately before December 12, 1963. By s. 3 this Order in Council established a constitution for Kenya, which was set out in Schedule 2 of the Order in Council. The Constitution provided for a Central

Legislature called Parliament and Regional Legislatures called Regional Assemblies with limitations attached severally to such legislatures. The Kenya Independence Order in Council, 1963, provided for the continuance of certain laws which existed at the time immediately before it came into operation, that is to say, immediately before December 12, 1963. These provisions are to be found in s. 4 and the material parts of this section for the present purpose are sub-ss. (1) and (8):

- “4.(1) Subject to the provisions of this Order, the existing laws shall, notwithstanding the enactment of the Kenya Independence Act, 1963 and the revocation of the existing Orders, continue in force after the commencement of this Order as if they had been made in pursuance of this Order, but they shall be construed with such modifications, adaptations, qualifications and exceptions as may be necessary to bring them into conformity with this Order.
- (8) For the purposes of this section, the expression ‘existing law’ means any Ordinance, Enactment, Law, rule, regulation, order or other instrument made or having effect as if it had been made in pursuance of the existing Orders and having effect as part of the law of Kenya or of any part thereof immediately before the commencement of this Order or any Act of the Parliament of the United Kingdom or Order of Her Majesty’s in Council (other than the Kenya Independence Act, 1963 and this Order) so having effect.”

Other provisions of this section provided that the existing laws as defined in sub-s. (8), should have effect as if they had been made by the Parliament or Regional Assembly, as the case may be, but they are not material in the present instance. It is to be noted that the Independence Act does not come within the definition of the existing law in sub-s. (8) of s. 4 of Kenya Independence Order in Council, 1963.

Now, in the case of India, where the Act of 1926 applied directly without the intervention of an Order in Council, there appears to be no doubt but that jurisdiction under the Act continued to exist only in respect of proceedings which had been instituted before the appointed day under the Indian Independence Act and that from that appointed day no jurisdiction remained in any Indian court under the Act of 1926 if the proceedings for divorce were not instituted before the appointed day.

In the case of Tanganyika, the question of continued application of the Act of 1926 to Tanganyika after the date of Tanganyika’s independence, fell to be considered by the Chief Justice of Tanganyika in *Partington v. Partington* (1). The learned chief justice held that the inclusion of Tanganyika in the list of self-governing Dominions, as defined in the Act of 1926, only had effect to prevent any Order in Council applying the Act to Tanganyika being made after the date of Tanganyika’s independence, but that it did not affect the continued effect of an Order in Council which had been made prior to that date. Consequently, it was held in *Partington v. Partington* (1) that the High Court of Tanganyika continued to have jurisdiction under the Act of 1926 after the date of Tanganyika’s independence, and in accordance with that judgment there would be jurisdiction under the Act of 1926 in Tanganyika whether the proceedings had been instituted before or after the appointed day in Tanganyika.

It was argued before me that notwithstanding the provisions of s. 7 of the Kenya Independence Act, 1963, there was jurisdiction in Kenya to entertain proceedings for divorce under the Act of 1926, where the proceedings were instituted after December 12, 1963. It was argued that s. 7 of the Kenya Independence Act only took away in such cases jurisdiction by virtue of the

Act and that it did not take away jurisdiction arising by virtue of an Order in Council such as the Kenya Divorce Jurisdiction Order in Council, 1928, which it was said remained in effect as an existing law by virtue of s. 4 of the Kenya Independence Order in Council, 1963. I think there are several fallacies in that argument. The Order in Council of 1928 could only apply the Act of 1926 in so far as and so long as there was jurisdiction under the Act and that jurisdiction was abolished in respect of proceedings which were not instituted before December 12, 1963, by s. 7 (1) of the Kenya Independence Act, 1963. I agree that the Kenya Divorce Jurisdiction Order in Council, 1928, continues in effect as an existing law, but it can only apply jurisdiction under the Act of 1926 in so far as that jurisdiction continues to exist and it cannot apply to the extent of maintaining jurisdiction which has been expressly taken away by s. 7, sub-s. (1) of the Kenya Independence Act. It continues, of course, to apply the Act of 1926 in respect of proceedings instituted before December 12, 1963, subject to any modifications necessitated to conform with the other provisions of s. 7 of the Kenya Independence Act. As I have already mentioned, the Kenya Independence Act, 1963, is not an existing law within the definition of the existing law in s. 4 of the Kenya Independence Order in Council, 1963. It has direct effect regardless of that Order in Council, and cannot be modified or amended under s. 4 of the Kenya Independence Order in Council in the same way as the existing laws may be treated under that section. The Act of 1926 is an existing law under s. 4 of the Kenya Independence Order in Council, 1963, but only to the extent and subject to any qualifications applying to it immediately before December 12, 1963, at which date it was already qualified by s. 7 (1) of the Kenya Independence Act, 1963, whereby as regards application to Kenya the Act of 1926 was subject to the qualification that as from the appointed day, that is December 12, 1963, there should be no jurisdiction under the Act of 1926 in the courts of Kenya in respect of proceedings which were not instituted before the appointed day.

The Act of 1926 has, of course, been extended or amended in various ways by subsequent Acts, which are together referred to as the Colonial and Other Territories (Divorce Jurisdiction) Acts, 1926 to 1950, but these amendments are not in themselves very important for the purpose of this judgment, and when I refer to the Act of 1926, I may be taken as intending to refer to that Act and also to any material provision of the other Acts comprising the Colonial and Other Territories (Divorce Jurisdiction) Acts, 1926 to 1950.

For the reasons which I have given I am satisfied that this court has no jurisdiction to grant the relief sought in these proceedings, which are, therefore, dismissed.

Petition dismissed.

For the petitioner:

Kaplan & Stratton, Nairobi

J. A. Couldrey

For the respondent:

Hamilton, Harrison & Matthews, Nairobi

J. D. M. Silvester

Kiralire v Sofasi Kawere Salongo and others

[1964] 1 EA 364 (HCU)

Division: High Court of Uganda at Kampala
Date of judgment: 26 June 1964
Case Number: 448/1963
Before: Bennett J
Sourced by: LawAfrica

[1] Fatal accident – Proper claimants – African deceased – Action by person as “legal representative and administrator” under customary law – Action for benefit of deceased’s estate and members of his family – Action under Law Reform (Miscellaneous Provisions) Ordinance, 1953 – Minor members of family – Non-joinder of parties – Meaning of “executor” and “administrator” in Law Reform (Miscellaneous Provisions) Ordinance, 1956, s. 8 (1) (U.).

Editor’s Summary

The plaintiff, suing as “legal representative and administrator” of a deceased African, filed a suit claiming damages from the defendants under s. 7 and s. 12 of the Law Reform (Miscellaneous Provisions) Ordinance, 1953, on behalf of certain members of the deceased’s family and also on behalf of the deceased’s estate for loss of expectation of life. At the hearing a preliminary issue of law that the plaintiff did not disclose any cause of action was argued and it was submitted that the suit should have been instituted in the names of the minors by a next friend under O. 29, r. 1, of the Civil Procedure Rules; that the plaintiff was not an executor or administrator within the meaning of s. 8 (1) of the Ordinance and consequently was not entitled to institute the suit in his own name; and that there was no averment in the plaintiff that the funeral expenses had been incurred by the persons for whose benefit the suit was brought.

Held –

- (i) Order 29, r. 1 of the Civil Procedure Rules was not applicable as it only applied to suits instituted in the name of a minor;
- (ii) the words “executor” or “administrator” in s. 8 (1), *ibid.*, mean respectively, a person appointed as such under a will and a person to whom letters of administration have been granted; the plaintiff was not an executor or administrator within the meaning of those words and he could not properly institute a suit in his own name for the benefit of the members of the deceased’s family;
- (iii) the plaintiff disclosed a cause of action but there has been a non-joinder of necessary parties; the members of the deceased’s family, or one of them should have been joined as co-plaintiffs and O. 1, r. 10 (2), enabled the court so to do.

Order accordingly.

Cases referred to in judgment:

- (1) *The Iron & Steelwares Ltd. v. C. W. Martyr* (1956), 23 E.A.C.A. 175.

Judgment

Bennett J: In this suit the plaintiff, suing as administrator of the estate of a deceased, claims damages from the three defendants under ss. 7 and 12 of the Law Reform (Miscellaneous Provisions) Ordinance, 1953 (hereinafter called the Ordinance), on behalf of certain members of the deceased's family. He also claims damages on behalf of the deceased's estate for loss of expectation of life. All three defendants, in para. 2 of their respective written statements of defence, aver that the plaint discloses no cause of action.

Counsel for the third defendant has abandoned this ground of defence to the claim.

Counsel for the first and second defendants has chosen to argue the point as to the preliminary issue of law, and bases his argument on three grounds.

His first contention is that since all the persons, with one exception, for whose benefit the suit has been instituted are minors, O. 29, r. 1, is applicable, and the suit should have been instituted in the names of the minors by a next friend. I can see no substance in this contention since O. 29, r. 1, only applies to suits instituted in the name of a minor, and the present suit has not been instituted in the name of a minor. Section 8 (1) of the Ordinance enables suits under s. 7 to be brought either in the name of the executor or administrator, or in the names of all or any of the members of the family of the deceased.

Counsel for the first and second defendants' next point is that the plaintiff, who describes himself in para. 1 of the plaint as "legal representative and administrator of the estate of the deceased duly appointed under the customary law", is not an executor or administrator within the meaning of s. 8 (1), and that consequently he is not entitled to institute the suit in his own name.

The Ordinance does not define the words "executor" or "administrator", but s. 2 thereof contains the following definition:

"A 'personal representative' means:

- (a) in the case of a deceased person to whom the Succession Ordinance applies either wholly or in part, his executor or administrator;
- (b) in the case of any other deceased person, any person who, under law or custom, is responsible for administering the estate of such deceased person."

Counsel for the first and second defendants' contention is that the definition of "personal representative" does not govern the interpretation of the words "executor or administrator" in s. 8 (1), and that accordingly those words must mean an executor or administrator appointed under the Succession Ordinance. Africans having been exempted from the whole of the provisions of the Succession Ordinance by an order under s. 334 of that Ordinance, counsel contends that the words "executor or administrator" cannot apply to an African. It is common ground that the plaintiff is an African. It is to be observed that while s. 13 of the Ordinance (which deals with survival of causes of action) uses the term "personal representative", s. 8 (1) uses the words "executor or administrator".

Since the Ordinance contains no definition of "executor or administrator", those words must, in my opinion, be construed according to their ordinary meaning. The ordinary meaning of "executor" is a person appointed as such by will. The ordinary meaning of "administrator", in relation to a deceased's estate, is a person to whom letters of administration have been granted.

Neither word would ordinarily include a person entitled by native law and custom to administer the estate of a deceased person. By using the words "executor or administrator" in s. 8 (1), and the words "personal representative" in s. 13 of the Ordinance, the legislature must have intended to draw a distinction between the class of persons who may institute a suit under s. 8 (1), and the persons who are entitled to institute a suit by virtue of s. 13 (7). I am therefore of opinion that the plaintiff, not being an executor or administrator, cannot properly institute a suit in his own name for the benefit of the members of the family. That is far from saying, however, that the plaint discloses no cause of action. In my opinion, the plaint clearly does disclose a cause of action, but there has been a nonjoinder of necessary parties. The members of the deceased's family, or one of them, should have been joined as co-plaintiffs having regard

to the fact that there is a claim under s. 7 of the Ordinance. Order 1, r. 9, provides that:

“no suit shall be defeated by reason of the misjoinder of non-joinder of parties, and the court may in every suit deal with the matter in controversy so far as regards the rights and interests of the parties actually before it.”

Order 1, r. 10 (2), enables the court to add “the name of any person who ought to have been joined, whether as plaintiff or defendant”.

Counsel for the first and second defendants’ third point was that there is no averment in the plaint that the funeral expenses had been incurred by the persons for whose benefit the suit was brought. He referred to s. 12 of the Ordinance which provides that such expenses can only be recovered as damages if incurred by the parties for whose benefit the action is brought. On a strict construction of the rules of pleading it may be that the plaint should have averred that the funeral expenses were incurred by the parties for whose benefit the action is brought. The defect is, however, curable by amendment and is no ground for saying that the plaint discloses no cause of action. As was said by Worley, P., in *The Iron & Steelwares Ltd. v. C. W. Martyr & Co.* (1) ((1956) 23, E.A.C.A., at p. 177):

“Procedural rules are intended to serve as the handmaidens of justice, not to defeat it.”

Holding as I do that the plaint discloses a cause of action both under s. 7 and under s. 13 of the Ordinance, I am not disposed to reject it under O. 7, r. 11, or to dismiss the suit under O. 6, r. 27.

Order accordingly.

For the plaintiff:

Jobanputra & Pandya, Kampala

M. V. Jobunputra

For the first and second defendants:

Singh & Treon, Kampala

Gurdial Singh

For the third defendant:

Wilkinson & Hunt, Kampala

P. J. Wilkinson, Q.C. and B. E. De Silva

State Of Uganda v Eremenjinto Waraga [1964] 1 EA 366 (HCU)

Division:	High Court of Uganda at Kampala
Date of judgment:	19 June 1964
Case Number:	65/1964
Before:	Udo Udoma CJ
Sourced by:	LawAfrica

[1] Criminal law – Charge – Particulars – Charge inconsistent with particulars – Evidence supporting charge but not particulars – No amendment of particulars sought – Conviction on charge as framed – Validity of conviction.

Editor's Summary

The accused was charged under s. 27 (1) of the Game (Preservation and Control) Ordinance, 1959, which prohibits hunting, killing or capturing any animal by means of snares and the particulars of the charge alleged that the accused was unlawfully found in possession of thirty-six wire snares for the purpose of hunting, killing or capturing animals. In his defence the accused stated that he had set the wires about half a mile from his house because animals were destroying his shamba and that he was at his home when the game guard found the wires. The magistrate accepted the evidence of the accused as amounting to a confession and convicted him. When the accused was arrested he made a statement to the police which was read at the trial and accepted by the accused as correct but it was not marked as an exhibit in the proceedings. In revision,

Held –

- (i) had the magistrate considered the evidence given by the accused in the light of the statement which formed part of the case of the prosecution, it

was not unreasonable to suppose that he would have found that the defence put up by the accused was one of justification and this defence was available to the accused under s. 27 of the Game (Preservation and Control) Ordinance, 1959;

- (ii) according to the particulars, the charge was one of unlawful possession of thirty-six snares for the purpose of hunting, killing and capturing any animal and it should have been laid under s. 27(3)(b) of the Ordinance and not under s. 27(1) which prohibits hunting, killing and capturing by snares;
- (iii) on the evidence the conviction was obviously wrong and, in all the circumstances, the trial was unsatisfactory; accordingly the conviction and sentence could not be allowed to stand.

Conviction and sentence set aside.

Judgment

Udo Udoma CJ: In this case the accused was charged as follows:

“Statement of Offence

Unlawful possession of snares for the purpose of Hunting game, contrary to sections 27 (1) and 90 of the Game (Preservation and Control) Ordinance, 1959.

Particulars of Offence

Eremenjinto Mindra Waraga, on or about the 21st day of February, 1964, at Eriaya village, Jago Moyo of Madi District, Northern Region, was unlawfully found in possession of thirty-six snares (wires) for the purpose of hunting, killing or capturing any animal.”

On February 27, 1964, when the charge was read out and explained to the accused, he said this:

“I was not found in possession of thirty-six wires. I was at home.”

A plea of not guilty was thereupon recorded for him and the case was adjourned.

On March 29, 1964, at the hearing, a game guard and a police constable gave evidence for the prosecution, the police constable being called to give evidence only of his having recorded in writing a statement from the accused, which statement, when read out in court, the accused had accepted as correct. It was however not marked as an exhibit in the proceedings.

The case of the prosecution was that on February 21, 1964, the game guard, Serafino Odongo (P.W.1) while on patrol at Eriaya village, found at a place half a mile from the house of the accused thirty-six wire snares, Exhibit A, set around in a manner to trap animals. On enquiry later the accused had admitted that the wires were his and that he had set them there for animals, which were destroying his shamba.

In his defence the accused, while admitting that he had set the wires there because of his shamba, maintained that the game guard, Serafino Odongo, (P.W.1) did not find him there but at his home.

The trial magistrate accepted that evidence as amounting to a confession of his guilt by the accused. He convicted him on the confession, and sentenced him to a fine of Shs. 60/- or two months in prison.

The file in this case had been forwarded to this court by the Director of Public Prosecutions who says, quite rightly, that he cannot support the conviction. On the evidence the conviction is obviously wrong. It is not easy to understand why the trial magistrate should have considered the explanation given by the accused at the trial as amounting to a confession. On the face of

the record, the explanation is nothing of the sort. The accused did not ask to change his plea of “not guilty”. The explanation offered by the accused was that although he had set the wires there, they were not found in his possession. It was therefore for the trial magistrate to make a finding as to whether or not the wires were found in the accused’s possession. This he failed to do.

Furthermore, the trial magistrate failed to give consideration to the statement made by the accused to the police when arrested and charged. The statement did not appear to have been exhibited in evidence in the proceedings although its contents were read in open court. It was not marked at all. This is an irregularity in law.

Had the trial magistrate considered the evidence given by the accused in the light of the statement which formed part of the case of the prosecution, it is not unreasonable to suppose that he would have found that the defence put up by the accused is one of justification. The explanation offered by the accused, in my view, was to the effect that he had put up the wires as a protection against animals which were molesting his garden and destroying his crops, a defence which appears to be recognised under s. 27 of the Game (Preservation and Control) Ordinance.

According to the particulars, the charge was one of unlawful possession of thirty-six snares for the purpose of hunting, killing and capturing any animal and should have been laid under s. 27(3)(b) of the Game (Preservation and Control) Ordinance and not under s. 27(1) which prohibits hunting, killing and capturing by snares.

On the other hand the evidence appears to support the charge of hunting animals by means of snares and does not satisfy the particulars set out in the charge. In the absence of any amendment, the prosecution is bound by the particulars in the charge.

In all the circumstances, the trial of this case was unsatisfactory. The conviction and sentence cannot be allowed to stand. They are set aside. The accused is acquitted and discharged. It is ordered that if the fine imposed has been paid, the same be refunded forthwith.

Court below to carry out this order.

Conviction and sentence set aside.

Chrisma Ltd v Emma Tsimon
[1964] 1 EA 369 (CAD)

Division:	Court of Appeal at Dar-es-Salaam
Date of judgment:	9 May 1964
Case Number:	12/1964
Before:	Sir Trevor Gould VP, Sir Daniel Crawshaw and Newbold JJA
Sourced by:	LawAfrica
Appeal from:	The High Court of Tanganyika – Biron, J.

[1] Land registration – Caveat – Application to court to remove – Hearing adjourned – Order that “in meantime caveat is to stand” – Subsequent application for registration of mortgage – Notice by Registrar to caveator – Notice that mortgage would be registered after one month unless otherwise ordered by High Court – Registrar not served with order before issue of notice – Whether Order is a direction within Land Registration Ordinance (Cap. 334), s. 78 (6) (T.).

Editor’s Summary

The respondent who claimed an interest in an estate of which the appellant company was the registered owner, caused a caveat to be entered in the land register under s. 78 (3) of the Land Registration Ordinance on July 2, 1962. On December 6, 1962, the appellant company then made a chamber application under s. 78 (4) *ibid.*, calling upon the respondent to show cause why the caveat should not be removed. Eventually on June 21, 1963, the trial judge adjourned the application to a hearing in open court and ordered that “in the meantime the caveat is to stand”. On June 30 and July 8, 1963, the appellant company and a proposed mortgagee executed a mortgage to secure a loan to the appellant company for Shs. 60,000/-; this deed was duly presented to the land registry and on August 23, 1963, the Registrar of Titles, who was unaware of the order of June 21, 1963, issued to the respondent a notice under s. 78 (6) *ibid.*, stating that the mortgage deed would be registered at the expiration of one month unless in the meantime the High Court should otherwise order. On September 21, 1963, the respondent filed a chamber application under s. 78 (6) *ibid.*, directed to the appellant and the Registrar, for an order that the caveat should not lapse and that the mortgage be not registered. The application came on for hearing before the same judge and at the hearing the Registrar stated that the order of June 21 only reached him on September 21, 1963, and that had he been aware of it earlier he would not have issued the notice of August 23. The appellant contended that an order made in proceedings to which the mortgagee was not a party was not relevant to the question whether the mortgage should be registered, and that as no order of the court had been made within a month of August 23, 1963, the caveat had lapsed and the mortgage should be registered. The trial judge granted the application on December 5, 1963, and directed that the caveat should not lapse and that the mortgage should not be registered till further order of the court. The appellant thereupon appealed on the grounds that under s. 78 (6) *ibid.* the caveat had lapsed, and consequently the mortgage should be registered, as no order of the court had been made within one month of the date of the notice from the Registrar, and, that the first order was of no effect for the purpose of s. 78 (6) *ibid.*, as it was made in proceedings to which the mortgagee was not a party. It was also argued for the appellant that the words “and in the meantime the caveat is to stand” in the first order were nothing other than a general statement that the position was to be the same as if no order had been made.

Held –

- (i) the words “in the meanwhile” appearing in s. 78 (6) *ibid.*, do not require an order of the High Court to be made within one month of the Registrar’s notice and an order of the court made previously in an application under

s. 78 (4), or possibly in any proceedings, could be an order coming within the words “or the High Court otherwise directs”;

- (ii) the words “and in the meantime the caveat is to stand” should properly be regarded as an order of the court that the caveat was to continue in existence until the proceedings were determined or until further order of the court; the first order not only could but did direct that the caveat should not lapse until further order of the court; as this order was served on the Registrar before the expiry of a month from his notice there was a direction of the High Court within the meaning of s. 78 (6) *ibid.*, that the caveat should not lapse;
- (iii) the fact that the mortgagee was not a party to the proceedings in which the first order was made was no reason for holding that the first order did not prevent the caveat from lapsing and in so far as he was affected by any order which dealt with the efficacy of the caveat he was bound by the order of the court.

Appeal dismissed.

Cases referred to in judgment:

- (1) *Attorney General of Gambia v. N'Jie*, [1961] A.C. 617; [1961] 2 All E.R. 504.

The following judgments were read:

Judgment

Newbold JA: This appeal raises a short point in relation to a caveat entered in the land register under the Land Registration Ordinance (Cap. 334 and hereinafter referred to as “the Ordinance”).

The relevant facts may be briefly stated as follows. The appellant is a limited company and Mr. C. Tsimon (hereinafter referred to as “the husband”) is a director of, and the principal shareholder, in the appellant. The appellant is the registered owner of an estate and the respondent (hereinafter referred to as “the wife”), following matrimonial differences between the husband and herself, claimed an interest in the estate and on July 2, 1962, caused a caveat to be entered in the land register under s. 78 (3) of the Ordinance as an encumbrance against the estate. On December 6, 1962, the appellant filed a chamber application under s. 78 (4) of the Ordinance calling upon the wife to show cause why the caveat should not be removed. Affidavits and counter affidavits were filed and eventually on June 21, 1963, a judge made the following order (hereinafter referred to as “the first order”):

“I cannot agree that no *prima facie* case has been raised – but rather the contrary. If the parties cannot come to terms the matter will have to be decided on its merits – which can only be done by hearing the parties and their witnesses in open court. The matter is therefore adjourned to a hearing in open court and in the meantime the caveat is to stand.”

On June 30, 1963, and July 8, 1963, a brother of the husband and the appellant respectively executed a mortgage deed of the estate, which mortgage deed was security for a loan of Shs. 60,000/- by the brother to the appellant. This mortgage deed was presented to the land registry for filing and on August 23, 1963, the Registrar of Tiles (who was then unaware of the first order and is hereinafter referred to as “the Registrar”) issued to the wife a notice under s. 78 (6) of the Ordinance stating that the mortgage deed would be registered at the expiration of one month from the date of the notice unless in the meantime the

High Court shall otherwise order. On September 21, 1963, the wife filed a chamber

application under s. 78 (6) of the Ordinance, directed to the appellant and the Registrar, for an order that the caveat shall not lapse and that the mortgage deed be not registered. This application was supported by an affidavit, which referred to the first order, and came before a judge (who was the same judge that made the first order) on November 21, 1963, when the advocate for the wife set out the history of the matter and the Registrar stated that the first order only reached him on September 21, 1963, and that had he been aware of it earlier he would not have issued the notice of August 23, 1963.

The appellant contended that the first order made in proceedings to which the brother was not a party was not relevant to the question whether the mortgage deed should be registered and that as no order of the court had been made within a month of August 23, 1963 (the date of the notice from the Register), the caveat lapsed automatically and the mortgage deed should be registered. The learned judge on December 5, 1963, granted the application, and directed that the caveat entered should not lapse and that the mortgage deed should not be registered till further order of the court. The reasons for his decision are set out in the following extract from his order (hereinafter referred to as "the second order"):

"The matter is by no means free from difficulty, and there does not appear to be any authority to the point. In the absence of any authority to the contrary, I find myself unable to hold that the mere service of a notice by the Registrar could, as it were, annul an order made by the court and render it nugatory. An order made by a court stands until it is either vacated by the court which made it, or set aside by a superior court. It cannot, to my mind, be nullified by the Registrar of Titles serving a notice under section 78 (6) of the Land Registration Ordinance. Although, as submitted by Mr. Fraser Murray, the wording of the Ordinance is clear and unequivocal, it certainly does not expressly cover a case where the High Court has made an order that a caveat is to stand; nor can it be spelt out from the wording of the Ordinance that the service of a notice by the Registrar can nullify a court order."

From this order the appellant appealed to this court and urged first, that under s. 78 (6) the caveat had lapsed, and consequently the mortgage deed should be registered, as no order of the court had been made within one month of the date of the notice of the Registrar; and, secondly, that the first order cannot be of any effect for the purpose of s. 78 (6) of the Ordinance as it was made in proceedings to which the brother, as mortgagee, was not a party.

Under ss. 41 and 57 of the Ordinance the mortgage deed would not have effect to secure the loan on the estate until it was registered. Sections 73 and 78 of the Ordinance, in so far as they are relevant, are as follows:

- "73. The Registrar shall enter in the land register as an incumbrance any order or injunction issued by a court restraining any disposition or staying any registration, where an office copy of such order or injunction is served upon him by or on behalf of any interested person. Any memorial so entered shall, while subsisting, operate to prevent the registration of any disposition incompatible with such order or injunction . . .
- 78(1) Any person who claims an interest in any registered land or any person who has presented a bankruptcy petition against the owner of any estate or interest, may present a caveat in the prescribed form.
- (3) Upon receipt of any such caveat, the Registrar shall enter the same in the land register as an incumbrance and shall notify the same to the owner of the estate or interest thereby affected.

- (4) The High Court, on the application of the owner of the estate or interest affected, may summon the caveator to attend and show cause why such caveat should not be removed and thereupon the High Court may make such order, either ex parte or otherwise as it thinks fit.
- (6) If a deed is presented for registration which purports or appears to affect any registered estate or interest in respect of which a caveat is entered, the Registrar shall give notice thereof to the caveator and shall suspend registration of such deed for one month from the date of such notice. At the expiration of such period, the caveat shall lapse and the deed shall be registered as at the date of presentation unless in the meanwhile the application for registration has been withdrawn or the High Court otherwise directs.”

It would seem that the general scheme of s. 78 is to preclude, subject to an order of the court, the registration for a month of any document affecting an estate in respect of which a caveat is in existence. This delay will not affect priorities as if the document is eventually registered then under s. 32 (1) of the Ordinance it will be deemed to be registered at the moment it was presented for registration.

The argument for the appellant on the first ground runs as follows: the mortgage deed was presented for registration, the Registrar gave notice thereof to the wife on August 23, 1963, and in accordance with s. 78 (6) the caveat lapsed (and the mortgage deed could be registered) on the expiration of one month from that date as in the meanwhile the High Court had not otherwise directed since neither the first order nor the second order was made “in the meanwhile”. There is force in that argument; nevertheless I reject it for the following reasons. Grammatically it is possible, though I accept it would not be the normal construction, to construe the words “. . . unless in the meanwhile the application for registration has been withdrawn or the High Court otherwise directs” as if the words “in the meanwhile” referred only to the withdrawal and not to the order. Is there anything in the Ordinance which compels such a construction? In my view there is. Section 78 (4) is clearly designed to allow the owner of the estate to test the validity and effectiveness of a caveat in the courts. If the owner chooses to adopt this course and an order is made which precludes, or precludes without further order of the court or without compliance with a condition, any dealing by the owner with his estate or the registration of any document pending the determination of the matter surely the owner cannot in effect disregard that order and the provisions of s. 73, execute a deed, cause it to be presented for registration and thrust on the caveator the onus of making application to the court for the separate examination of a position which has either already been examined or is in course of examination. To allow the owner to do this would be to nullify an order of the court in proceedings specifically provided in the section for examination of the position in relation to the caveat and I cannot accept that such would be a proper construction of the section as a whole. This being so, I am satisfied that the words “in the meanwhile” do not require the High Court order to be made within one month of the Registrar’s notice and that an order of the court made previously in an application under s. 78 (4), or possibly in any proceedings, could be an order coming within the words “or the High Court otherwise directs.”

This still leaves for consideration the question whether the terms of the first order were in fact such as to prevent the caveat from lapsing a month after the Registrar’s notice. I was at first attracted to the view urged by the appellant that the words “and in the meantime the caveat is to stand” in the first order were nothing other than a general statement that the position was to be the

same as if there had been no order made. On reconsideration of all the factors in this case I find myself unable to accept that view. In the first place it would mean that the first order would be of precisely the same purport whether or not these words appeared and on general principles I do not consider that an order of the court should be construed on the basis that words forming part of the actual order are words completely superfluous and unnecessary. Secondly, as the first order adjourned proceedings which were directed towards testing the validity of the caveat and as the words in question came immediately after the adjournment of the proceedings I consider that the words in question should properly be regarded as an order of the court that the caveat was to continue in existence until those proceedings were determined or any further order of the court was made. Finally, and this is purely fortuitous, the judge who made the first order and who would thus best know what he intended also made the second order and in his second order he seemed to regard the words of the first order as words which required a further order of the court before the caveat should cease to have effect contrary to the wishes of the caveator. I am therefore satisfied that the first order not only could but did direct that the caveat should not lapse until further order of the court. As this order was served on the Registrar before the expiry of a month from his notice (the order should, of course, have been served much earlier) there was a direction of the High Court within the meaning of s. 78 (6); and as this direction was to the effect that the caveat should not lapse in the circumstances I am satisfied that the appellant fails on his argument on the first ground.

Having regard to my views on the effect of the first order it is unnecessary to consider the effect of the second order, but as the matter may well be of considerable importance in determining the practice I think I should state that, in my view, so long as application to the court is made within the month it is unnecessary that the actual order should be made within the month. A some-what similar problem arose in *Attorney-General of the Gambia v. N'Jie* (1) and Lord Denning, in delivering the judgment of the Privy Council ([1961] A.C., at p. 635) stated:

“But this would mean that the application itself would have to be heard within twenty-one days. That cannot have been intended. No court could bind itself to give a date for the hearing within that time. All that was intended was that notice should be lodged with the court within twenty-one days; and a copy served on the opposite party as soon as possible . . . “

and then went on to construe the provision in question as if it contained words to that effect. I would adopt and apply that view to s. 78 (6), the more especially as there is no specific reference therein, as there is in s. 78 (4), to an ex parte order. In my view s. 78 (6) should be read as if it contained a provision that the caveat should not lapse but should await the order of the court if within a month of the Registrar's notice the caveator makes application to the court for an order and serves as soon as practicable all necessary parties with notice of such application.

I turn now to the second ground of appeal, which was that the first order could not have any effect for the purposes of s. 78 (6) as the mortgagee was not a party to the proceedings in which it was made. In essence this ground simply is that the court cannot make an order for the purposes of s. 78 (6) unless every party to the deed which is sought to be registered was a party to the proceedings in which the order was made. I cannot accept this. If, as is my view, an order made before the presentation of the deed for registration can be an order for the purposes of s. 78 (6) it is extremely unlikely that all the parties to the deed would have been parties to the proceedings in which the order was made. If

the appellant is correct this would nullify to a large extent a specific order made under s. 78 (4) and as I have already stated I consider that the section as a whole should be construed as if an order made in an application under s. 78 (4) had effect for the purposes of s. 78 (6). I accept that it may well be desirable to allow all the parties to the deed to present their arguments in favour of registration. If the order of the court is an interim order made in proceedings pending at the time the deed is presented for registration, the parties could apply to be joined in those proceedings. If the order is a final order then the parties to the deed could bring it under review as far as they were concerned under the provisions of ss. 101 and 102 of the Ordinance. I do not consider, therefore, that the fact that the brother was not a party to the proceedings in which the first order was made is any reason for holding that the first order did not prevent the caveat from lapsing. I would point out that the brother is not a party to these proceedings, but that will not prevent the order of this court from being binding on him in so far as he is affected by any order which deals with the efficacy of the caveat.

For these reasons I would dismiss the appeal with costs.

Sir Trevor Gould VP: The facts and the history of this matter are concisely set out in the judgment of Newbold, J.A., and do not need restatement. The construction of s. 78 of the Land Registration Ordinance (Cap. 334, Tanganyika Revised Laws) in relation to those facts is the problem in the appeal and it is not an easy one. The section reads:

- “78(1) Any person who claims an interest in any registered land, or any person who has presented a bankruptcy petition against the owner of any estate or interest may present a caveat in the prescribed form.
- (2) Every such caveat shall be supported by a statutory declaration stating the facts upon which the claim is based.
 - (3) Upon receipt of any such caveat, the Registrar shall enter the same in the land register as an incumbrance and shall notify the same to the owner of the estate or interest thereby affected.
 - (4) The High Court, on the application of the owner of the estate or interest affected may summon the caveator to attend and show cause why such caveat should not be removed and thereupon the High Court may make such order, either ex parte or otherwise as it thinks fit.
 - (5) Any person who has presented a caveat may at any time withdraw the same by a notice in the prescribed form executed and attested in the manner required for deeds by ss. 92 and 93.
 - (6) If a deed is presented for registration which purports or appears to affect any registered estate or interest in respect of which a caveat is entered, the Registrar shall give notice thereof to the caveator and shall suspend registration of such deed for one month from the date of such notice. At the expiration of such period, the caveat shall lapse and the deed shall be registered as at the date of presentation unless in the meanwhile the application for registration has been withdrawn or the High Court otherwise directs.
 - (7) The interest protected by a caveat may not be made the subject of a second caveat so as to defeat the provisions of the last foregoing subsection.”

This section, I think, may well give rise to anomalies. There is no statement of the effect of a caveat except that it is to be entered in the register “as an incumbrance” and has the consequences set out in sub-s. (6) in relation to instruments subsequently presented for registration. By s. 31 (2) an “entry” is

effected by a memorial in the register. Under s. 34 every person acquiring any estate or interest in registered land is deemed to have actual notice of every subsisting memorial.

I will deal first with sub-s. (6). Upon presentation of a deed for registration the Registrar is to give notice to the caveator. At the expiration of a month the caveat lapses (i.e. it is not postponed but goes out of existence) and the deed is registered as at the date of its presentation, “unless in the meanwhile the application for registration has been withdrawn or the High Court otherwise directs”. I would construe that phrase, in relation to an ordinary case under the subsection, as meaning that the High Court direction must be given before the expiration of the one month period. I do not think it would be sufficient (as happened with the second order in the instant case) if an application to the court was made within the month but the direction was not given within that period. I base that view, and the view that the case of *Attorney-General of the Gambia v. N’Jie* (1) (referred to by Newbold, J.A.) is distinguishable, upon the fact that the subsection places upon the Registrar a mandatory duty to be performed at the expiration of the month. He has to make the entries necessary to complete registration as at the date of presentation of the deed, and is given no discretion or authority to postpone that action on the chance or even expectation that a court direction may be forthcoming. The *Gambia* case (1) related to a procedural matter which was susceptible of a construction of convenience, which, for the reason I have given, I think is not the case with sub-s. (6). It would, it is obvious, be a rare case in which the whole dispute between the person registering the deed and the caveator could be disposed of within a month, but the very looseness of the phrase “otherwise directs” appears to imply that the court possesses the widest jurisdiction, which would include the power to make interim or temporary orders. Under some registration systems (e.g., the Kenya Registration of Title Ordinance, Cap. 281 Revised Laws, s. 57) there is specific provision for an application by the caveator for an extension of time, but I think the same result could be arrived at in Tanganyika by other means.

The meaning I have indicated is the one I believe to flow from the language used in sub-s. (6) in relation to a transaction unaffected by any considerations save those within the four walls of the subsection. But s. 78 must be construed as a whole particularly as it contains the whole of the provisions of the Ordinance in relation to caveats. Subsection (4) contains provision for the making of orders by the High Court in proceedings initiated by the owner of the estate or interest affected by the caveat. Such an order (described by Newbold, J.A., as “the first order”) was in existence in the present case when the mortgage deed was presented for registration and was served on the Registrar before the expiration of the thirty day period. For the reasons given by Newbold, J.A., I consider that the order in question is to be treated as a valid and effective order under sub-s. (4) and the Registrar is not concerned with the reasons of the High Court for making it. I see nothing in sub-s. (6) which should be construed as preventing that order from taking effect according to its tenor, and its purport was that the caveat should stand pending the hearing of the dispute in open court. The caveat is registered as an incumbrance and the effect of the order is that the incumbrance shall remain until the court otherwise orders. In my opinion that is sufficient, reading the section as a whole, to prevent the lapse of the caveat during the currency of the order. No part of s. 78 is made subject to any other but I think that once the court has put its hand on the register by order under sub-s. (4) it would take specific provision, or at least clearer words than have been used in sub-s. (6) to enable the machinery of that subsection to render the order nugatory.

An intending mortgagee may ask why he should lose the advantageous position he held in being able to force the caveator to move the court under sub-s. (6). In the present case he could not complain with justice as he took his mortgage after the caveat was lodged and was deemed to have actual notice of it under s. 34; he took it moreover, after the first order was made, and has shown singularly little desire to join in the proceedings. In another case a mortgage might have been executed but not registered before the caveat and in such a case the intending mortgagee may suffer in a matter of convenience but not of justice. Justice can only be done by the parties resolving their dispute in court and a party desirous of registering a deed would have no difficulty in applying to be joined as a party to existing proceedings. As Newbold, J.A., has pointed out there are also sections under which he could initiate proceedings.

It has been submitted that if this court held that the effect of s. 78 (6) was that a caveat would lapse unless the court direction (as distinct from the application) was given within a month, the appeal should be allowed whatever effect was attached to the first order. I do not think that follows. The court has a general jurisdiction to deal with the rights of the parties to litigation which it can exercise (otherwise than by rectification of the register in the strict sense) by ordering the execution of instruments and by making such orders and injunctions as are referred to in s. 73 of the Ordinance. Section 78 (6), I think, presupposes this existing jurisdiction. The parties have been content to argue the matter without bringing in the intending mortgagee and the proceedings were little more than a continuation of the existing litigation in which the court held that its first order prevented the lapse of the caveat with the result that the period of one month mentioned in s. 78 (6) was indefinitely extended. The order under appeal added little or nothing to the existing position but I could not say it was made without jurisdiction.

For these reasons I agree with the order proposed by Newbold, J.A., and the appeal is dismissed with costs.

Sir Daniel Crawshaw JA: I have had the advantage of reading the judgments of my brother judges. Subsection (6) of s. 78 of the Land Registration Ordinance reads:

“If a deed is presented for registration which purports or appears to affect any registered estate or interest in respect of which a caveat is entered, the Registrar shall give notice thereof to the caveator and shall suspend registration of such deed for one month from the date of such notice. At the expiration of such period, the caveat shall lapse and the deed shall be registered as at the date of presentation unless in the meanwhile the application for registration has been withdrawn or the High Court otherwise directs.”

I have little difficulty in coming to the conclusion that on a proper construction of this subsection a caveat lapses unless prior to the expiration of the month prescribed the High Court has otherwise directed or, which does not concern us in this appeal, application for registration has been withdrawn. It is what the subsection says, and it seems to me to be a perfectly reasonable provision where a registered title is interfered with by way of a caveat. What has been referred to in the other judgments as the “second order”, which gives rise to this appeal, was not therefore within time.

The “first order” was made whilst the respondents’ caveat was on the register and prior to the presentation for registration of the mortgage deed by the mortgagee. The order was made in proceedings instituted by the caveatee under s. 78 (4), summoning the caveator to show cause why the caveat should not be removed. In adjourning the matter for hearing in open court the learned

judge said, “in the meantime the caveat is to stand”. The question is whether that order came within the period “in the meanwhile” in s. 78 (6), or whether those words refer only to the period between notice or presentation of the deed and expiration of the month. I am inclined to the view that the words should not be construed in a narrow sense to exclude a direction of the court relating to a caveat given prior to the presentation, for such direction would presumably be given in the course of proceedings between a caveator and caveatee for settlement of their respective rights, and I do not see how the presentation of a deed for registration could affect those matters in dispute. The application for a direction under s. 78 (6), made presumably by the caveator, would be to prevent the caveat lapsing. In view of the first order, the subsequent application would appear therefore to be not only unnecessary but very possibly embarrassing.

Counsel for the caveatee has submitted, however, that there was no reason to suppose that the first order was intended as a “direction” within the meaning of sub-s. (6), and that it was no more than stating what would be the position anyway, but for the bringing into operation of that subsection by the presentation of a deed. I was at first inclined to think that that was a correct view, but on reflection I do not think that one is entitled to place any limitation on what appears to have been the intention of the order that the caveat should stand until the rights of the parties be determined.

On the conclusions I have come to the application was unnecessary and was misconceived. The Registrar had felt himself bound by the first order and had refused to register the deed. No action was therefore necessary by the caveator. If action was to be taken by anyone it would have been by the mortgagee to seek to enforce registration by way of mandamus.

Ground 3 of the memorandum reads:

“The order appealed against could not be validly made after the period of one month referred to in section 78 of the said Ordinance which period expired on 23rd September, 1963, some four weeks before the making of the order appealed against.”

In support of this ground counsel for the caveatee has submitted that if it is held that the second order (described as a “direction” by the learned judge) was not made within time, then whatever the view of this court as to the effect of the first order, the second order was made on wrong premises. Counsel for the caveator said the application had been made “for further protection . . . that the caveat should stand”; in the circumstances as they exist I suppose he meant it was in the nature of an application for a declaration as to the effect of the first order in the light of subsequent events. As I have said, this was an unnecessary luxury as the Registrar had refused to register the deed. It cannot be said that the caveator was merely anticipating a writ of mandamus, for there is nothing on the record to suggest that such was being contemplated. At the same time, however, the caveatee did not allow the application to go by default, and although he had not presented the deed for registration he was, as mortgagor, an interested party in it, and argued on lines which, had they been successful, would have meant that registration should have been affected. The mortgagee was not a party to the proceedings and I do not see that strictly speaking he is bound by them. Had the caveatee ignored the caveator’s application, as I think he would have been well advised to have done, he would have incurred no costs, and I cannot see how he could have been ordered to pay the costs of the caveator. As it was he contested the application on the merits of the first order, and I cannot see that the order of the learned judge that the costs should be costs in the cause was, in the circumstances, wrong. He has now appealed, and although the ground on which he has been successful (i.e. that a direction under s. 78 (6) must be made before the expiration of the month) raised a

point of law which we have decided on grounds similar to those argued by him, it does not, on our view of the first order help him. I think the appeal should therefore be dismissed with costs.

Appeal dismissed.

For the appellant:

Fraser Murray, Roden & Co., Dar-es-Salaam

W. D. Fraser Murray

For the respondent:

Sayani & Co., Dar-es-Salaam

K. A. Master, Q.C. and N. Sayani

Vallabhdas Hirji Kapadia v Thakersey Laxmidas
[1964] 1 EA 378 (CAM)

Division:	Court of Appeal at Mombasa
Date of judgment:	3 February 1964
Case Number:	4/1963
Before:	Sir Trevor Gould Ag P, Crawshaw Ag VP and Newbold JA
Sourced by:	LawAfrica
Appeal from:	The Supreme Court of Kenya – Webber J.

[1] *Conversion – Agent – Sale of goods – Title – Produce shipped to Mombasa on owner’s instructions – Fraudulent shipper – Sale by shipper through agent – Delivery taken by agent on arrival – Agent acting in good faith – Claim by owner against shipper’s agent for conversion – Conduct of owner misleading agent – Estoppel – Which of two innocent parties to bear loss for another’s fraud.*

[2] *Estoppel – Agent – Sale of goods – Fraud – Goods shipped to Mombasa on owner’s instructions – Sale by shipper through agent – Goods invoiced by shipper to his agent – Invoicing known to owner – Delivery taken on arrival by agent – Agent and owner acting in good faith – Custom that goods delivered against invoices known to owner – Claim for conversion by owner against shipper’s agent – Whether owner estopped from denying authority of agent to dispose of goods.*

Editor’s Summary

On April 6, 1957, the appellant purchased 240 drums of coconut oil f.o.b. Zanzibar and instructed one, J.V. to ship the goods to Mombasa by the “Miranda” and to obtain the bills of lading therefor. The goods were shipped to Mombasa under two bills of lading, each for 120 drums, the shipper being stated to be J.V. & Co. with delivery to order; these bills were then endorsed in blank by J.V. and handed to the

appellant. On the same day J.V. sent the respondent two invoices, each in respect of 120 drums of coconut oil shipped by the "Miranda". The respondent who acted on a commission basis as J.V.'s agent in Mombasa for the sale of coconut oil, had, prior to April 6, 1957, informed J.V. that he had sold 240 drums of coconut oil. The appellant was aware that J.V. had invoiced the drums to the respondent and had made an entry in his books to this effect; he was also aware that the respondent was J.V.'s agent for the sale of coconut oil, and that, according to the custom of the Old Port, Mombasa, delivery of the drums would be given to the respondent on presentation of the invoices, but he believed that by keeping the bills of lading he retained ownership and control of the goods. On arrival of the "Miranda" at Mombasa on April 8, the respondent took delivery of the drums and used them for the sale made by him for J.V. On April 15, the respondent met two bills drawn by J.V. in the belief that he was paying for the drums which had arrived by the "Miranda". The two bills together with bills of lading and invoices to which they were attached and which referred to drums with the same marks and of the same value as those shipped by the "Miranda", related to 120 drums alleged to have been

shipped on the “Vera” and to 120 drums shipped on the “Citi”. In fact, no drums had been shipped on the “Vera” and drums which had been shipped on the “Citi” had been previously paid for. The confusion had been deliberately created by J.V. with intent to defraud. On April 17, invoices identical with those dated April 6 were made out and two bills each in respect of 120 drums shipped on the “Miranda”, were drawn by J.V. on the respondent, and the appellant handed these documents and the bills of lading to the bank with instructions not to part with the bills of lading till the bills of exchange were met. On discovering that they related to drums which he had already received and paid for, the respondent refused to accept the bills. The appellant was not aware until after May that the respondent had refused to meet the two bills of exchange relating to the “Miranda” shipment. A similar fraud in respect of a further 180 drums was also perpetrated by J.V. involving the same parties. On or about June 18, 1958, the appellant filed a plaint against the respondent claiming general damages based on conversion of the goods and alleging that the respondent had “unlawfully and without any claim of title removed or caused to be removed, and/or carried away” the goods and that the respondent “unlawfully converted the same to his own use and wrongfully deprived” the appellant of them. The defence was, inter alia, that the respondent had received, sold and duly paid for the goods in the belief that J.V., as principal, had consigned them to the respondent for sale in their normal course of business, that the respondent was unaware of the appellant’s interest in the goods, and that the appellant was estopped by his conduct from asserting that J.V. was not the owner of the goods. The trial judge found, inter alia, that both parties had acted bona fide, that it was a case of deciding which of two innocent parties should suffer for the fraud of a third person and held that since J.V. was the appellant’s mercantile agent for the sale of the drums, and that, in any event, the conduct of the appellant misled the respondent into thinking that J.V. was the owner of the goods. The appellant thereupon appealed on the grounds that J.V. was never the appellant’s mercantile agent, that the appellant’s conduct was not such as to mislead the respondent and that the property in the goods never passed from the appellant and that the respondent by selling the goods had converted them to his own use.

Held –

- (i) though the respondent was negligent in paying for the goods on documents which referred to other goods, such negligence did not in any way affect his position in relation to any conversion;
- (ii) on the facts the respondent should be regarded in the same position as a bona fide purchaser; it would be wrong to affix to the respondent the fraud of J.V. merely because the respondent had acted for him on a commission basis;
- (iii) the appellant was precluded from denying the authority of J.V. to deal with the goods as he did, and was thus precluded from asserting that the respondent dealt with the goods wrongfully or was liable to the appellant in conversion.

Appeal dismissed.

Cases referred to in judgment:

- (1) *Hollins v. Fowler* (1875), L.R. 7 H.L. 757.
- (2) *Lickbarrow v. Mason*, 100 E.R. 35.
- (3) *Commonwealth Trust Ltd. v. Akotey*, [1926] A.C. 72; [1925] All E.R. Rep. 270.
- (4) *Mercantile Bank of India Ltd. v. Central Bank of India Ltd.*, [1938] A.C. 287; [1938] 1 All E.R. 52.

(5) *Eastern Distributors Ltd. v. Golding*, [1957] 2 All E.R. 525.

The following judgments were read:

Judgment

Newbold JA: On April 6, 1957, the appellant purchased 240 drums of coconut oil f.o.b. Zanzibar. The facts, admitted or found by the trial judge, in relation to the subsequent disposition of these drums are as follows. The appellant instructed one Jethalal Valabhdas (hereinafter referred to as Jethalal) to ship the goods to Mombasa by the “Miranda” and to obtain the bill of lading therefor. The goods were shipped to Mombasa under two bills of lading, each for 120 drums, the shipper being stated to be Jethalal Valabhdas & Co. (which firm is hereinafter also referred to as Jethalal) with delivery to order; and these bills of lading were then endorsed in blank by Jethalal and handed to the appellant. On the same day, that is, April 6, 1957, Jethalal sent to the respondent two invoices, each in respect of 120 drums of coconut oil shipped by the “Miranda” and supplied by Jethalal to the respondent at a price of Shs. 34/- per 36 lb. The respondent had for a number of years been acting on a commission basis as Jethalal’s agent in Mombasa for the sale of coconut oil and the respondent had, prior to April 6, 1957, informed Jethalal that he (the respondent) had effected a sale of 240 drums of coconut oil. The appellant was aware that Jethalal had invoiced the 240 drums to the respondent and had made an entry in his (the appellant’s) books to that effect; he was also aware that the respondent was Jethalal’s agent in Mombasa for the sale of coconut oil, and that, according to the custom of the Old Port, Mombasa, delivery of the drums would be given to the respondent on presentation of the invoices; but the appellant believed that by retaining possession of the bills of lading he retained the ownership and control of the goods. The “Miranda” arrived at Mombasa on April 8, and the respondent, who was unaware that anyone other than Jethalal was the owner of the goods, obtained delivery of them by presenting the invoices and immediately used them to fulfil the contract of sale of which he had previously informed Jethalal. On April 15, the respondent met two bills of exchange drawn by Jethalal on the respondent in respect of 240 drums in the belief that he was paying for the 240 drums which had arrived by the “Miranda”. Those two bills of exchange, together with the bills of lading and invoices to which they were attached and which referred to drums with the same marks and of the same value as those shipped by the “Miranda”, related to 120 drums alleged to have been shipped on the “Vera” and to 120 drums shipped on the “Citi”; in fact, however, no drums were shipped on the “Vera” and drums which had been shipped on the “Citi” had been paid for previously. Jethalal had embarked on a system of teeming and lading and the confusion had been deliberately created by him with intent to defraud. On April 17, invoices identical with those dated April 6, were made out, two bills of exchange, each in respect of 120 drums shipped on the “Miranda” were drawn by Jethalal on the respondent, and the appellant handed these documents and the bills of lading to the bank with instructions not to part with the bills of lading till the bills of exchange were met. These two bills of exchange were presented by the bank to the respondent on April 25, and the respondent, thinking that they related to drums which had not yet arrived, stated that he would pay on receipt of the goods. On discovering that they related to drums which he had already received and paid for, he refused to accept the bills. The appellant was not aware until after May that the respondent had refused to meet the two bills of exchange relating to the “Miranda” shipment.

On May 18, 1957, the appellant purchased 180 drums of coconut oil f.o.b. Zanzibar. The facts, admitted or found by the trial judge, in relation to the subsequent disposition of these drums are basically similar to those relating to the 240 drums purchased on April 6, 1957, and are as follows. The appellant instructed Jethalal to ship the goods to Mombasa and to obtain bills of lading therefor. The drums were

shipped as to 60 by the “St. George” and as to 120 by the “Aris” and in each case a bill of lading was obtained showing Jethalal

as the shipper with delivery to order and the bill was endorsed in blank by Jethalal and handed to the appellant. On the same day, that is May 18, Jethalal sent to the respondent two invoices, the one for 120 drums of coconut oil shipped by the "Aris" and the other for 60 drums of coconut oil shipped by the "St. George", in each case the drums being supplied by Jethalal to the respondent at a price of Shs. 33/25 per 36 lb. The appellant was aware of those invoices and made an entry in his (the appellant's) book to that effect; he was aware also that the goods were to be sold to the respondent, and that delivery would be given to the respondent on presentation of the invoices; but the appellant believed that by retaining possession of the bills of lading he retained the ownership and control of the goods. The appellant at no time handed over these bills of lading to anyone. On the "Aris" and the "St. George" arriving at Mombasa the respondent, who was unaware that anyone other than Jethalal was the owner of the goods, obtained delivery of the drums and sold them before the end of May, 1957. As regards the 120 drums on the "Aris" he paid Jethalal for them by meeting a bill of exchange, which referred to 120 drums shipped on the "Mwafala", in the belief that he was paying for the drums shipped on the "Aris". As in the case of the "Miranda" the confusion was deliberately created by Jethalal in order to defraud. As regards the 60 drums on the "St. George", as no bill of exchange in respect of them was presented to the respondent, he credited the account of Jethalal in his books with the proper sum, which was insufficient to cover the debit balance then existing in the books. The respondent refused to pay the appellant for the 180 drums shipped by the "Aris" and the "St. George" on the ground that he had already either paid or credited Jethalal for them.

On or about June 18, 1958, the appellant filed a plaint against the respondent, the prayer of which claimed "General damages based on conversion of the said goods", that is, the 420 drums of coconut oil, it being alleged that the respondent had "unlawfully and without any claim of title removed or caused to be removed and/or carried away" the said goods and that the respondent "unlawfully converted the same to his own use and wrongfully deprived" the appellant of them. The defence was, inter alia, that the respondent had received, sold and duly paid for, the goods in the belief that Jethalal as principal had consigned them to the respondent for sale in accordance with their normal course of business, that the respondent was unaware that the appellant had any interest in the goods, and that the appellant was estopped by his conduct from asserting that Jethalal was not the owner of the goods. The trial judge found that both the appellant and respondent had acted bona fide and that it was a case of deciding which of two innocent parties should suffer for the fraud of a third person. The trial judge held that Jethalal was the appellant's mercantile agent for the sale of the drums of oil, that the respondent had no knowledge of the appellant's interest in the goods, that the appellant was "bound by the disposition of the oil" to the respondent by Jethalal and that in any event the conduct of the appellant was such that it was calculated to mislead and did mislead the respondent into thinking that Jethalal was the owner of the goods; and he accordingly gave judgment in favour of the respondent. From this the appellant appeals on the following three main grounds: first, that Jethalal was never the appellant's mercantile agent as Jethalal was never in possession of the drums of oil, or the documents of title thereto, within the meaning of s. 2 of the Factors Act, 1889; secondly, that the appellant's conduct was not such as to mislead the respondent as the appellant had never held out to anyone that Jethalal was his agent nor had he at the material time given Jethalal authority to sell the goods nor was he negligent in his dealings with Jethalal; and, thirdly, that the property in the goods never passed from the appellant and that the respondent by selling the goods had converted them to his own use.

The general rule of law is that when a person wrongfully deals with goods with the intention of asserting a right inconsistent with the rights of the true owner of the goods then that person is liable to the true owner in an action of conversion and it makes no difference whether that person was or was not aware of the rights of the true owner (see *Hollins v. Fowler* (1)). To this general rule there are certain very limited exceptions which arise either under common law or by statute and all of which require bona fides on the part of the person claiming to come within the exception. In this case it is clear that the appellant was the true owner of the goods, that he had not given Jethalal any authority to dispose of them, that the respondent by selling the goods intentionally dealt with them in a manner inconsistent with the rights of the appellant, and, on the principle *nemo dat quod non habet*, as Jethalal had no power to authorise any sale of the goods, such sale by the respondent was wrongful even though he was unaware that the appellant was the true owner of the goods. Thus, unless the respondent can bring his case within the very limited exceptions to the general rule, he is clearly liable to the appellant.

Before I consider whether the respondent has brought himself within any exception to the general rule, I wish to dispose of two matters which have been referred to in the argument. First, it was submitted that the respondent was negligent in paying for the goods on documents which referred to other goods; and I understood the submission to be that this negligence affected the liability of the respondent as it should have put him on enquiry as to the true ownership of the goods. I agree that the respondent was negligent, but I do not consider that such negligence affects in any way his position in relation to any conversion. As regards the “Miranda” shipment, the respondent had sold the goods before he paid against the incorrect documents, thus in this case the respondent had no reason to put on enquiry before dealing with the goods. At about this time the respondent did take up with Jethalal the question of wrong documents, but, as the trial judge stated, Jethalal “was able to fob him off for the time being into believing that everything was in order”. The respondent also took up with the bank the matter of Jethalal’s honesty and towards the end of May, 1957, informed Jethalal that their business connection should cease. As, however, the respondent had, neither in April nor in May, any knowledge or indication of the interest of any person other than Jethalal in the goods, it is difficult to see what further enquiry the respondent at that time could reasonably have made. Thus the negligence of the respondent relates only to the question of payment and this in no way affects his liability on conversion. Secondly, it was submitted that the respondent by reason of being the agent of Jethalal was not entitled to the protection which any bona fide purchaser from Jethalal would have. The appellant knew that the goods were invoiced to the respondent, but the manner in which the agency was conducted is by no means clear, nor is it clear whether the appellant knew that the respondent was the agent of Jethalal and not the purchaser from him. I was at first attracted to the point of view that the respondent, however innocent he may be, must, as Jethalal’s agent, have attached to him the fraud of Jethalal with the result that he could not claim bona fides, a requisite element before he could claim to come within any exception to the general rule of liability. On consideration, however, I consider that on the facts of this case the respondent should be regarded in the same position as a bona fide purchaser from Jethalal. The goods were, to the knowledge of the appellant, invoiced to the respondent as if he were the purchaser from Jethalal and, so far as is known, the respondent in turn sold the goods as if he were the owner thereof. In these circumstances I consider it would be wrong to affix to the respondent the fraud of Jethalal merely because the respondent operated on a commission basis for Jethalal.

The judge held that the respondent came within each of two exceptions to the general rule of liability. He held first, that as Jethalal was the mercantile agent of the appellant, the act of Jethalal in invoicing the goods to the respondent for the purpose of the sale thereof by the respondent, must, under s. 2 (1) of the Factors Act, 1889, as applied to Kenya, be as valid as if the appellant had expressly authorised it, with the result that the respondent had not wrongfully dealt with the goods and had thus not converted them. Secondly, he held that the conduct of the appellant was such that he was “bound by the disposition of the oil by Jethalal through the (respondent) to the various purchasers”.

Dealing with this second ground first, the circumstances in which, and the common law principles on which, the conduct of the owner of goods precludes him from recovering in conversion against a person who has bona fide dealt with the goods in a manner inconsistent with the true owner’s rights have been the subject of a number of decisions which it is almost impossible to reconcile. On the one hand there is the broad rule, stated by Ashhurst, J., in *Lickbarrow v. Mason* (2) (100 E.R., at p. 39), that:

“wherever one of two innocent persons must suffer by the acts of a third, he who has enabled such third person to occasion the loss must sustain it”,

which rule was endorsed and applied by the Privy Council in *Commonwealth Trust Ltd. v. Akotey* (3). Applying this broad rule the appellant clearly could not succeed. On the other hand this broad rule has been stated to be much too broad. (See, for example, the judgment of the Privy Council in *Mercantile Bank of India Ltd. v. Central Bank of India Ltd.* (4)). I consider that the true common law principle is that where the true owner of goods, in breach of his duty to a third party, arms his agent, or knowingly permits his agent to arm himself, with some indicia of title to the goods and allows the agent to deal with the goods as if they were his own, then the true owner is precluded as against this third party (and any subsequent dealer) who deals bona fide with the goods and without the knowledge of the rights of the true owner from denying the authority of the agent to deal with the goods in the manner in which they were dealt with. In such a case it is unnecessary that the agent should have possession of the goods. This common law principle has been the basis of the statutory provisions included in the Factors Act and the Sale of Goods Ordinance, which provisions are in some respects broader but in others narrower than the common law principle, but these statutory provisions have not abrogated the common law principle (see *Eastern Distributors Ltd. v. Goldring* (5)).

What are the relevant facts in this case? They are that on the appellant’s instructions to Jethalal the goods were shipped to Mombasa and therefore had to be there received and dealt with by someone. To enable the goods to be so received and dealt with the appellant knowingly allowed Jethalal to send to the respondent invoices which on their faces were documents recording the fact that the goods had been sold by Jethalal to the respondent for specified sums, which thus impliedly warranted the authority of Jethalal to sell the goods; and which according to the custom of the port enabled the respondent to obtain the possession of the goods. The appellant thus armed Jethalal, or knowingly permitted Jethalal to arm himself, with what were, in the circumstances of this case, indicia of title to the goods and not mere delivery orders and thus allowed him to deal with the goods as if they were his. As the appellant knew that the goods were being sent to the respondent he was under a duty to inform the respondent, or to ensure that the respondent was informed, of his (the appellant’s) interest in the goods. He did not do so; and the respondent, unaware that the appellant was the true owner, dealt with the goods in a manner inconsistent with the appellant’s rights. On these facts I consider that, in accordance

with the common law principle which I have enunciated, the appellant is precluded from denying the authority of Jethalal to deal with the goods as he did, and is thus precluded from asserting that the respondent dealt with the goods wrongfully or is liable to the appellant in conversion.

As I have come to the conclusion that the appellant is unable to succeed by reason of the common law principle to which I have referred, I find it unnecessary to consider the arguments in relation to the Factors Act.

For these reasons, in spite of the sympathy which I feel for the appellant, I consider that the appeal should be dismissed with costs and I would give a certificate for two counsel.

Sir Trevor Gould Ag P: I have had the advantage of reading the judgment of Newbold, J.A., and agree with his reasoning and conclusions. I would add that I think the estoppel created by the conduct of the appellant extended also to the question of the nature of the agency of Jethalal. The learned judge in the Supreme Court held that he was the mercantile agent of the appellant. Before this court it was argued that that finding was erroneous as Jethalal did not have possession of the goods as required by the Factors Act. As holder of the bills of lading while the vessels were in transit the appellant could claim as against the shipowners to have the over-riding right to possession. But in relation to the other interested parties that ignores the special circumstances that production of bills of lading was not necessary to enable the goods to be claimed and delivered at the Old Port of Mombasa. That fact was known to the appellant, as were the facts that Jethalal was shown as the shipper of the goods in the ships' records, that Jethalal had prepared and sent invoices to the respondent naming himself as supplier, that the invoices would enable the respondent to take possession of the goods, and that Jethalal customarily consigned goods to the respondent for the purpose of sale. Thus, the appellant knowingly put Jethalal in a position to make delivery of the goods to a known person with every appearance of being in possession of the goods in the ordinary course of business; in the special circumstances I think that the appellant was estopped as against the respondent from denying that Jethalal was in possession of the goods, and, provided that Jethalal had possession, I do not understand it to have been argued that he did not fulfil all the requirements of a mercantile agent.

The appeal will be dismissed with costs, with a certificate for two counsel.

Crawshaw Ag VP: I have read the judgments of Newbold, J.A. and Gould, Ag. P. with which I agree and have nothing to add.

Appeal dismissed.

For the appellant:

Clive Salter, Q. C. and V. S. Bhatt, Nairobi

For the respondent:

Indamdar & Indamdar, Mombasa

I. T. Indamdar and Ram Hira

Division: Court of Appeal

Date of judgment: 11 June 1964

Case Number: 93/1963

Before: Sir Samuel Quashie Idun P, Sir Trevor Gould VP and Sir Daniel Crawshaw JA

Sourced by: LawAfrica

Appeal from The High Court of Uganda – Jones, J.

[1] Fatal accident – Damages – Contributory negligence – Claim by widow of deceased – Employers of deceased joined as third parties – Apportionment of blame – Deceased sixty per cent. to blame – Judgment for widow entered for forty per cent. of dependency – Third parties ordered to indemnify defendants for sixty per cent. of their liability – Whether order proper.

[2] Practice – Third party proceedings – Motor accident – Contributory negligence – Claim by widow of deceased – Deceased held sixty per cent. to blame – Deceased's employers joined as third parties – Judgment for widow against defendants for forty per cent. of dependency – Third parties ordered to indemnify defendants for sixty per cent. of their liability – Whether order proper.

[3] Practice – Appeal – Competence of appeal – Motor accident – Contributory negligence – Preliminary decree embodying judgment apportioning blame between parties – Third parties ordered to indemnify defendants – Appeal on apportionment of blame dismissed – Subsequent hearing of appeal on quantum of damages – Issue that order to indemnify improper – Whether appeal competent in view of preliminary decree.

Editor's Summary

Following a fatal accident between a car driven by one, P, and a vehicle driven by the second respondent in which P. was killed, his widow sued in Civil Case No. 833 of 1961 (from which this appeal was brought) for damages against the second respondent and his employers, the first respondents. In their defences the two respondents put in issue the questions of negligence and contributory negligence but did not counterclaim for damage to the vehicle driven by the second respondent. They also joined the appellants, who were P.'s employers until his death, as third parties and in their statement of claim alleged that P. was driving negligently and claimed that if they were held liable to the plaintiff they were entitled to be indemnified by the appellant either entirely or, alternatively, for such amount as the court might direct. The appellants in their defence denied negligence on the part of P. and alleged negligence or contributory negligence on the part of the second respondent and prayed that the claim of both respondents for indemnity be disallowed or, alternatively, allowed only for such proportion of the claim as the court should deem proper. There were three other actions for damages (Civil Cases Nos. 832, 834 and 835 of 1961) arising out of death of or injuries to passengers involved in the same accident, in all of which the two respondents were defendants and the appellants were joined as third parties. By a consent order Civil Cases Nos. 832, 833, 834 and 835 were consolidated "on the issue of liability only". The trial judge apportioned the blame as to sixty per cent. to P. and forty per cent. to the second respondent and gave judgment for the plaintiff and as between the respondents and the appellant held that the respondents were entitled to indemnity to the extent of sixty per cent. from the appellant. A preliminary

decree, entitled in the consolidated action, was drawn up in these terms and no distinction was therein drawn between any of the actions which were consolidated on the issue

of liability. At the hearing the whole matter had been confined to the negligence of the two drivers. In Civil Appeal No. 73 of 1962 the judgment and preliminary decree in the consolidated action were made the subject of an appeal by the present appellant but that appeal was dismissed. The various actions then continued separately and in Civil Case No. 833 brought by the widow of P., the trial judge assessed the general damages at £8,625 and special damages at £25, held that she was entitled to forty per cent. of this sum amounting to £3,450 and concluded: "The various items of damage are to be paid in the following proportion: forty per cent. by the first and second defendants and sixty per cent. by the third party." Accordingly the final decree as drawn provided inter alia, that the respondents were entitled to recover against the appellants as third parties sixty per cent. of the said sum of £3,450 and £25. On appeal against this judgment and final decree the appellants complained that the trial judge had erred in law in ordering them to pay sixty per cent. of the damages paid by the respondents and argued that there were two judgments, a preliminary and a final, and that the dismissal of the appeal on the preliminary did not take away the statutory right of appeal on the final. For the respondents it was argued that the point of law relating to payment of sixty per cent. of the damages had not been taken in any proceedings prior to this appeal and that the issue of liability of the appellant had already been the subject of appeal which had been dismissed.

Held –

- (i) (Per Sir Trevor Gould, V.-P. and Sir Daniel Crawshaw, J., Sir Samuel Quashie-Idun, P., dissenting): the third party proceedings were misconceived as the appellant was not a joint tortfeasor with the two respondents in relation to the claim of the plaintiff;
- (ii) (Per Sir Samuel Quashie-Idun, P. and Sir Daniel Crawshaw, J.A., Sir Trevor Gould dissenting): the question of liability had been decided, whether rightly or wrongly, in the preliminary judgment, and in the final judgment it was only a matter of applying that liability to the damages awarded, a mere mathematical calculation; therefore, it was not competent for the appellant to appeal at this late stage on what was decided by the preliminary decree, a decision which could have been made a ground of appeal in the first appeal to this court;
- (iii) apart from the period prescribed by rules within which an appeal must be filed, s. 70 of the Civil Procedure Ordinance (Cap. 6) was a further bar to the appeal.

Appeal dismissed.

[Editorial Note: The order of the High Court of Uganda in *Savitaben Arvindbhai Patel v. Barclays Bank D.C.O. and Another*, [1963] E.A. 554, at p. 557, has been held erroneous in law.]

Cases referred to in judgment:

- (1) *James Ngaya v. Beers*, [1961] E.A. 390 (C.A.).
- (2) *Zarina A. Shariff v. Noshir P. Sethna*, [1963] E.A. 239 (C.A.).
- (3) *United Marketing Co. v. Hasham Kara*, [1963] 2 All E.R. 553; [1963] E.A. E.A. 276 (P.C.).
- (4) *Drinkwater and Another v. Kimber*, [1952] 2 Q.B. 281; [1952] 1 All E.R. 710.
- (5) *Ingram v. United Automobile Service Ltd. and Another* [1943] K.B. 613; [1943] 2 All E.R. 71.
- (6) *British Fame v. McGregor*, [1943] A.C. 197; [1943] 1 All E.R. 33.

The following judgments were read:

Judgment

Sir Trevor Gould VP: This appeal has been brought as a result of third party proceedings which (so far as this action is concerned) have been misconceived from the beginning.

On January 23, 1961, Arvindbhai Raojibhai Patel was driving a Hillman car which came into collision with a Land Rover driven by Edwin Felix Vincent de Souza and Patel was killed instantly. Patel's widow (hereinafter called "the plaintiff") brought an action (Civil Case No. 833/61) for damages against de Souza and his employer Barclays Bank D.C.O. (hereinafter respectively called "the second defendant" and "the Bank"). They filed defences putting in issue the questions of negligence and contributory negligence but did not counterclaim for damages in relation to the Land Rover. The Bank and the second defendant then joined Champion Motor Spares Ltd., which company up to the time of Patel's death had been his employer, as third party in the action and filed statements of claim against it. The claim was in each case that the Hillman was being driven negligently by the servant or agent of the third party and that in the event of the Bank or the second defendant being held liable to the plaintiff they claimed they were entitled to be indemnified by the third party either for the whole amount or alternatively for such amount as the court might direct.

That is where the misconception first arose. There is no basis in law (or any other basis) in an action turning on the negligent driving of Patel (hereinafter called "the deceased") or the second defendant or of both, and brought by the dependants of the deceased, for saying that the third party, as the employer of the deceased, was liable to pay the whole or any part of the damages ordered to be paid by the second defendant and the Bank by reason of the negligent driving of the second defendant. The third party was not a joint tortfeasor with the Bank and the second defendant in relation to such a claim, which is the only basis upon which it could have been ordered to contribute towards the discharge of their liability.

Nevertheless, the third party obviously thought that it could be made liable, for it filed a defence denying negligence on the part of the deceased and alleging negligence or contributory negligence on the part of the second defendant; the defence prayed (inter alia) that:

- "(a) The claim of both defendants for indemnity be disallowed *or alternatively* such claim be allowed only for such proportion of the claim as this Honourable court may in the circumstances of the case deem proper."

There were three other actions arising out of the same accident in all of which the second defendant and the Bank were defendants and the third party was joined in the same way. Civil Case No. 832/61 was brought by a woman and her husband for injuries sustained by her while a passenger in the Hillman car. Civil Case No. 834/61 was brought in respect of injuries to a six-year-old boy, who was also a passenger in the Hillman. Civil Case No. 835/61 was brought by the widower of another woman passenger in the Hillman, who was killed in the accident.

On July 2, 1962, a consent order was made that Civil Cases Nos. 832, 833, 834 and 835 be consolidated "on the issue of liability only". On that issue evidence was heard and judgment was given on July 13, 1962, the concluding passage of the judgment being:

"I consider justice would be met if I apportion the blame sixty per cent. on the Hillman and forty per cent. on the Land Rover.

I give judgment for the plaintiff against the defendant, and as between the defendants and the third party I hold that the defendants be entitled to

indemnity to the extent of sixty per cent. from the third party and that the question of costs be reserved between defendants and third party until the end of the case.”

A preliminary decree, entitled in the consolidated action, was drawn up and, so far as material, reads:

“THESE SUITS, consolidated for hearing on the issue of liability only by Order dated 2nd July, 1962, coming on this day for such hearing before the Honourable Mr. Justice Jones, in the presence of Mr. P. J. Wilkinson, Q.C. and Mr. R. E. Hunt, advocates for the respective plaintiffs and Mr. B. O'Donovan and Mr. A. I. James, advocates for the defendants, and Mr. Y. V. Phadke, advocate for the third party.

IT IS ORDERED that the defendants are hereby declared to be liable to the respective plaintiffs, and that as between the defendants and the third party the defendants be and are entitled to indemnity by way of contribution from the third party to the extent of sixty per cent. (60%) of the defendants' liability to the respective plaintiffs.”

It is evident that no distinction was drawn between any of the actions which were consolidated on the liability issue. Examination of the notes of argument at the hearing of the consolidated action shows that the whole matter was confined to the negligence of the two drivers. Mr. Wilkinson who appeared for the plaintiff opened by saying, “The only issue to be tried now is negligence.” He also made the only reference in any of the arguments to the question of contribution when, in his final address, he said:

“Sufficient for us to establish some negligence. Not concerned with contribution. Pleadings were a flat denial. We are entitled to judgment. Defendants entitled to indemnity from third party.”

The judgment and preliminary decree in the consolidated action were made the subject of an appeal to this court in Civil Appeal No. 73/62, the third party being the appellant. On the appeal once again the sole issue was negligence. The third party argued that the deceased should not have been held negligent at all or alternatively that he should have been held negligent in a less degree, the prayer in the memorandum of appeal was that the decree that the third party indemnify the second defendant and the Bank be set aside in whole or in part. The appeal was dismissed.

It is quite obvious that up to this point nobody had realised that there was a substantial distinction between the action (No. 833/61) in which this appeal has been brought and the other three consolidated actions (Civil Cases 832, 834 and 835 of 1961). The three last-mentioned were all actions arising out of the injury or death of passengers, who could recover their whole damages against any of the concurrent or joint tortfeasors (see *James Ngaya v. Beers* (1), and *Zarina A. Shariff v. Noshir P. Sethna* (2)). They sued the Bank and the second defendants who were quite entitled to claim contribution from the third party, for it was, as employer of the deceased, a joint tortfeasor in relation to the injuries suffered by the passengers. The negligence of its employee contributed to those injuries. In the case now under appeal the approach is quite different because the deceased was the driver. The plaintiff could not succeed for the whole amount of her damage unless the deceased was absolved of all negligence, because under s. 15 (1) and (4) of the Law Reform (Miscellaneous Provisions) Ordinance, 1953, the damages recoverable where the deceased has been partly at fault are proportionately reduced. In effect he recovers only the proportion attributable solely to the negligence of the other driver, and in that negligence neither the deceased nor his employer had any share. In relation to that negligence the deceased or his estate would, in any action for damages arising out of

the accident, be entitled to indemnity from the Bank and the second defendant, and s. 14(1)(c) of the Ordinance above-mentioned provides that no person shall be entitled to contribution under the section from any person entitled to be indemnified by him in respect of the liability in respect of which the contribution is sought. In the present appeal counsel for the Bank and the second defendant did not attempt to argue against this view of the law, but, at the stage of Civil Appeal No. 73/62 none of the parties immediately concerned seem to have applied their minds to the distinction.

I return now to the narration of the proceedings. The appeal having been dismissed the various actions continued separately and there was a further hearing at which the plaintiff called evidence in proof of her damage, the evidence and argument were limited to that one question. The learned judge found that the total amount of general damages was £8,625 and that the plaintiff was entitled to forty per cent. of that sum, amounting to £3,450. He also awarded Shs. 500/- special damages which he does not appear to have reduced in the same way but no point has been taken on this. He concluded his judgment with the following passage:

“The various items of damage are to be paid in the following proportions: forty per cent. by the first and second defendants and sixty per cent. by the third party.”

That judgment was delivered on March 28, 1963. The next step was taken on September 25, 1963, and it will be convenient to set out the notes of the learned judge of the proceedings on that day:

“James for Barclays.

Wilkinson and Hunt for plaintiff and third party.

Parekhji for third party.

James: First and second defendants have satisfied their liability to the plaintiff.

We ask for contribution against the third party. This application is for you to settle the decree.

Wilkinson: There is a dispute between Parekhji's firm and Champion Motor Spares, so they asked me to represent them. The dispute between the insurance company and the third party no concern of this court.

Parekhji & Co. had to be served.

Parekhji (Jnr.): I ask formally for leave to withdraw.

James: This application is under O. 18, r. 7 (3). This is not an appeal. This is an application as to what your judgment means.

I have paid the full amount to the plaintiff.

Your Lordship did not award £8,625, but £3,450. Whether that is right or wrong, we are not concerned with here.

Wilkinson: The decree should go on to say that defendants only liable to forty per cent. of the said sums. The third party should not have been brought in as third parties.

Ruling

My decision in this case is expressed in the draft decree filed by Hunter & Greig and not in the one filed by Messrs. Wilkinson & Co.

(Sgd.) D. Jeffreys Jones

Judge

Wilkinson: I want extension of time to file Notice of Appeal against the judgment in that event.

Order

Leave to extend time of filing Notice of Appeal granted. Notice to be filed in seven days.

(Sgd.) D. Jeffreys Jones

Judge

25.9.63.”

The court was informed from the bar that when Mr. James said he had paid the full amount to the plaintiff he was referring to the forty per cent. of the total damages. The final decree (in the form submitted by Hunter & Greig) was then filed and I reproduce the following passages as material:

“The plaintiff having on the 13th day of July 1962 obtained interlocutory judgment herein against the defendants for damages to be assessed and the defendants on the same date having obtained interlocutory judgment herein against the third party for contribution to the extent of sixty per cent. of the damages so to be assessed. And the damages having on the 28th day of March 1963 been assessed at the sum of Shs. 69,000/- in respect of general damages and the sum of Shs. 500/- in respect of special damages.

IT IS ORDERED that the plaintiff do recover against the defendants the sum of Shs. 69,000/- in respect of general damages and the sum of Shs. 500/- in respect of special damages with interest thereon at the rate of six per cent. per annum from the 23rd day of October 1961 until payment in full.”

.....

“AND IT IS FURTHER ORDERED that the defendants do recover against the third party sixty per cent. of the said sums of Shs. 69,000/- and Shs. 500/- with interest thereon at the rate of six per cent. per annum from the 23rd day of October 1961 until payment in full.”

The appeal from this judgment and final decree is based upon the ground that the learned judge erred in law in ordering payment by the third party to the Bank and second defendant of sixty per cent. of the damages. I have already given reasons for holding that the learned judge did so err and counsel for the Bank and second defendant did not argue to the contrary. Instead he relied upon two submissions, first, that this was a point of law not taken in any proceedings prior to this appeal and, second, that the issue of liability of the third party had already been the subject of Appeal No. 73/62.

The first point occasions no real difficulty. It is true that the point of law was not taken in the court below, at least until Mr. Wilkinson took it in the proceedings to settle the final decree, and the court was referred to the judgment of the Privy Council in *United Marketing Company v. Hasham Kara* (3). In my view, however, the instant case is entirely exceptional. There appears to have been a complete misconception of law from the beginning, perhaps arising from the association of the case with the suits of the three passengers. No further investigation of the facts is needed, for the point is one which could and should have been taken at the pleading stage. Counsel for the Bank and the second defendant suggested that if the third party had adopted that course it was possible that further investigation might have taken place and a defect in the Hillman car might have been discovered which might have contributed to the accident. Counsel would, I think, have to contend with yet another “might”, for if such a contributory mechanical defect had been found to exist the learned judge might well have diminished the percentage of negligence attributable to the deceased rather than that of the second defendant.

This suggestion, for it is no more, is too remote to be entertained seriously. Moreover it implies a completely new case by substituting (or adding) personal

negligence on the part of the third party for vicarious responsibility for the negligence of its employee, which is all that was relied upon in the pleadings and at the hearing. The court is dealing with what is, in my opinion, a clear case of miscarriage of justice, and this argument ought not to be acceded to.

The next question is a difficult one. Having regard to the history of the litigation is it open to this court to put the matter right in an appeal from the final decree? Neither counsel quoted any authority on this aspect of the matter. Counsel for the third party submitted that the adjudication was included in the final decree and judgment, from which an appeal lay. Counsel for the respondent argued that the question of the liability of the third party was decided in Civil Appeal No. 73/62 which finally disposed of the matter; that only the mathematics were worked out in the subsequent judgment; that no new decision on liability was taken then, that the point could have been taken on the first appeal and that for this court to interfere now would be to vary its previous decision.

Section 70 of the Civil Procedure Ordinance (Cap. 6 of the Laws of Uganda, 1951) provides:

“Where any party aggrieved by a preliminary decree does not appeal from such decree, he shall be precluded from disputing its correctness in any appeal which may be preferred from the final decree.”

It would appear a fortiori that, if the party does appeal, and his appeal is dismissed, he may not dispute the correctness of the preliminary decree on appeal from the final decree. Prima facie this appears to be a bar to the present appeal, but I think that it is arguable that the judgment of the learned judge on the question of liability, applying as it did to four actions, must necessarily be construed with some elasticity and that it was not intended to eliminate all questions but the mere calculation of damages. For example it was not construed as eliminating the distinction between the actions of the three passengers, in which one hundred per cent. of the damage proved was awarded, and the present one in which, by the application of the provisions of the Law Reform (Miscellaneous Provisions) Ordinance, 1953, only forty per cent. of the proved damage was awarded. If it had been argued before the learned judge when the damages issue was tried that he had made no distinction in his judgment relating to liability between the four actions and that therefore he must give judgment for one hundred per cent. of the damages in the present action, I am sure he would have rejected the argument. Similarly I think he could properly entertain any corollary to the special treatment which the present case received in the reduction of the award to forty per cent. of the damages. The corollary I have in mind is that, by making that reduction the learned judge really gave effect to his earlier judgment on contribution; by only having to pay forty per cent. of the plaintiff's damages the Bank and the second defendant are in the same position as if they had paid one hundred per cent. and received back a contribution of sixty per cent. from the estate of the deceased and/or the third party. It was open, in my judgment, for the third party to argue on the damages proceedings (and this appeal) that the effect of the judgment actually given was to give the Bank and the second defendant contribution twice over. That is a valid argument and one which, if it had been properly presented to him, the learned judge ought to have accepted.

For the reasons I have given I consider the appeal is competent. I would accordingly allow the appeal to the extent that I would set aside those portions of the judgment and decree which order that the defendants (the Bank and second defendant) recover against the third party sixty per cent. of Shs. 69,000/- and Shs. 500/- with interest. The third party, by taking the course it did in the High Court, was the main contributor to its own misfortunes there and I would not interfere with the orders for costs made against it. The costs of the appeal are not quite in the same position. The appeal was necessitated by failure on

the part of the third party to take the relevant point of law until after judgment. On the other hand the Bank and the second defendant had notice of it in the proceedings prior to the final decree, and have sought to retain the benefit of a judgment to which they are not entitled, on technical grounds only. I find this attitude rather surprising in a reputable bank, or, if the bank is not the real party, in a reputable insurance company. I would order that the Bank and the second defendant pay one half of the third party's costs of the appeal.

Sir Samuel Quashie-Idun P: Having had the opportunity of reading and considering the judgments of the Vice-President and of Crawshaw, J.A., and having given anxious and serious consideration to the points involved in this appeal, I am unable with the greatest respect to find myself in agreement with the views expressed by the Vice-President.

The facts and the circumstances which led to this appeal are clearly stated in the judgments of my two brother judges. In the two judgments, my brother judges have agreed that the third party proceedings initiated by the present respondents were misconceived. They, however, disagree as to what should be the result of the present appeal. As to the proceedings being misconceived, I would refer to the case of *Drinkwater and Another v. Kimber* (4), in which it was held that if the defendant in that case had pleaded in his counterclaim that the plaintiff was guilty of negligence and had proved it, the defendant would have succeeded in his claim for contribution against the plaintiff who was a separate tortfeasor.

What the present respondents did was what, it was held, should have been done by the defendant in the case cited. I am, therefore, of the opinion that the proceedings were not misconceived.

Apart from the view I have held I am in agreement with the reasons given by my brother Crawshaw that the appeal should not be allowed, particularly by virtue of the provisions of s. 70 of the Civil Procedure Ordinance (Cap. 6 of the Laws of Uganda).

I would also refer to the case of *Ingram v. United Automobile Service Ltd. and Another* (5), in which it was held that where an appellate tribunal accepts the findings of fact of the court below that two defendants in an action for negligence were both to blame, it should, in the absence of error in law, only in very exceptional circumstances reverse the apportionment of blame made by the trial judge.

In *British Fame v. Macgregor* (6), the House of Lords gave an instance of very exceptional cases, as where a number of different reasons were given why one ship is to be blamed, but the appellate court, on examination, found some of the reasons not to be valid.

In the present case, the decision of the trial court that the present appellants as employers of Patel were also to be blamed for the negligence was upheld by this court on December 11, 1962.

For the reasons I have given I am in agreement with the order proposed by my brother Crawshaw and the appeal is dismissed with costs.

Sir Daniel Crawshaw JA: This is an appeal by the third party to the suit against an order directing him to pay a part of the damages for which the defendants were held liable to the plaintiff.

On January 23, 1961, there was a collision between a Land Rover driven by the second respondent as an employee of the first respondent and a Hillman car driven by A. R. Patel as an employee of the appellant. A. R. Patel (hereinafter referred to as "the deceased") was killed, and in civil suit No. 833, from which this appeal arises, his widow sued the respondents on behalf of herself and other dependants. Separate actions for damages were also brought against the

respondents (hereinafter referred to generally as “the defendants”) in civil cases Nos. 832 and 834 by, or in respect of, passengers injured in the Hillman, and in civil case No. 835 in respect of the death of a passenger in the Hillman.

In each of the four suits, the defendants, with the leave of the court brought in the appellant as a third party (hereinafter referred to as the “third party”) and filed statements of claim against it claiming to be entitled to an indemnity by the third party in respect of any liability the defendants might be held responsible for to the respective plaintiffs. The third party in each case filed a defence to the statements of claim denying any negligence by the deceased, or alternatively, alleging contributory negligence by the defendants. In its prayer in suit 833 (and presumably there was a like prayer in the other suits also) the third party said:

“(a) The claim of both defendants for indemnity be disallowed *or alternatively* such claim be allowed only for such proportion of the claim as this honourable court may in the circumstances of the case deem proper:”

I have had the advantage of reading the judgment of the Vice-President. I agree with him so far as this suit (No. 833) is concerned (and we are directly concerned in no other suit) the third party proceedings were, for the reasons given by him, misconceived, the defendants having made no counterclaim in respect of the Land Rover. The fact remains, however, that they were instituted without any objection being taken to the procedure which has continued throughout on the basis of the pleadings.

On July 2, 1962, the lower court consolidated the four suits for the purpose of trying the issue as to liability, and it appears that the judgment thereon, delivered on July 13, 1962, was intended to be applicable to each suit. After considering the evidence, the learned judge said:

“... I consider justice would be met if I apportion the blame sixty per cent. on the Hillman and forty per cent. on the Land Rover.

I give judgment for the plaintiff against the defendant, and as between the defendants and the third party I hold that the defendants be entitled to indemnity to the extent of sixty per cent. from the third party and that the question of costs be reserved between defendants and third party until the end of the case.”

A preliminary decree was duly signed, the operative words reading:

“IT IS ORDERED that the defendants are hereby declared to be liable to the respective plaintiffs, and that as between the defendants and the third party the defendants be and are entitled to indemnity by way of contribution from the third party to the extent of sixty per cent. (60%) of the defendants’ liability to the respective plaintiffs. AND IT IS FURTHER ORDERED that the issue of costs be reserved until the final disposal of these suits.”

It seems to me that it might have been argued that this order meant that the defendants were liable to the plaintiffs in each suit to the extent of one hundred per cent. This was in fact the interpretation put upon the order for the purposes of suits Nos. 832, 834 and 835, and quite rightly so, for the passengers bore no contributory negligence and could recover in full from the defendants, who in turn, could properly claim contribution from the third party. It would, however, have been quite wrong to have ordered one hundred per cent. payment by the defendants to the plaintiff in suit 833, because of the apportionment of blame involving the plaintiff’s husband, the deceased. The order should have been that the defendants pay to the plaintiff forty per cent. only. That the order in this respect meant two different things according to the respective suits has, apparently, been recognised by the parties as well as the judge. The parties have

never questioned that in respect of suit 833 the defendants were liable to the plaintiff to the extent of forty per cent. only.

In each suit, however, this part of the order relates only to the position between the respective plaintiffs and the defendants, and follows naturally on the pleadings and on the issue between them. Could it be said similarly that the order means two different things between the defendants and the third party? It would be not only logical and just that this should follow, and that contribution should be made by the third party to the defendants in suits 832, 834 and 835, but not in 833 for the very obvious reasons given by the Vice-President. But the latter distinction does not, in my opinion, follow from the pleadings and the issue between the defendants and the third party in suit 833. From the beginning the third party in its written defence recognised the possibility of it being held liable by way of indemnity to the defendants in that suit should the deceased be held proportionately liable in negligence with the defendants. It was this indemnity that was claimed by the defendants, and specifically ordered by the judge. With the greatest reluctance I therefore think there is no room for introducing into the order as it relates to the position between the defendants and the third party a term that in suit 833 the reference to indemnity should be ignored as being not applicable to that suit. In fact, I would go further and say that on the pleadings and the judge's findings of fact, it might have been difficult for him to have made an order other than that which he did, except on the basis that there was no legal right to indemnity in the circumstances, a situation which was not recognised by anyone at the time.

Unlike the recognition of the differing degree of liability between the respective plaintiffs and the defendants, neither the parties nor the judge in suit 833 questioned the application of the order as to indemnity by the third party until after the issue as to the quantum of damages had later been settled. Before that happened, however, the third party appealed to this court (civil appeal No. 73 of 1962) against the judgment and decree on the consolidated issue of liability, asking that the deceased be held not negligent or, alternatively, in a lesser degree of negligence, and that the order as to indemnity be accordingly set aside in whole or in part. The third party did not at this stage question that if it was liable in indemnity in one suit it was liable in all.

The appeal was dismissed on December 11, 1962, and thereafter the question of quantum of damages was made an issue in each suit separately. In suit 833 the third party was actively represented in those proceedings by counsel, who clearly recognised the third party's liability to indemnify in the preliminary decree. At the commencement of his judgment, which was delivered on March 28, 1963, the learned judge observed that the question of liability in all four suits had been decided in the preliminary judgment, and that all he was now concerned with was the assessment of damages. Having given reasons for the gross sum he arrived at, he said "In this case I have allotted the blame to an amount of sixty per cent. on the third party, the plaintiff's husband". The judge was of course wrong to say that the plaintiff's husband, the deceased, was the third party; the sixty per cent. blame had been allotted to the deceased. The learned judge then awarded the plaintiff forty per cent. of the gross sum and stated the proportion of that sum each defendant should receive and added, "the various items of damage are to be paid in the following proportion: forty per cent. by the first and second defendants and sixty per cent. by the third party".

A dispute arose as to the wording of the decree, it being submitted for the first time on behalf of the third party (a different advocate was then representing the third party) that the latter should never have been brought into the suit. The judge accepted the decree as drafted by the respondents and which contained the following extracts:

“The plaintiff having on the 13th day of July 1962 obtained interlocutory judgment herein against the defendants for damages to be assessed and the defendants on the same date having obtained interlocutory judgment herein against the third party for contribution to the extent of sixty per cent. of the damages so to be assessed. And the damages having on the 28th day of March 1963 been assessed at the sum of Sh. 69,000/- in respect of general damages and the sum of Sh. 500/- in respect of special damages

It is Ordered that the plaintiff do recover against the defendants the sum of Sh. 69,000/- in respect of general damages and the sum of Sh. 500/- in respect of special damages with interest thereon at the rate of six per cent. per annum from the 23rd day of October 1961 until payment in full.

And it is Further Ordered that the defendants do recover against the third party sixty per cent. of the said sums of Sh. 69,000/- and Sh. 500/- with interest thereon at the rate of six per cent. per annum from the 23rd day of October 1961 until payment in full.”

In this appeal against that judgment and decree the third party complains that the learned judge erred in law in ordering it to pay sixty per cent. of the damages paid by the defendants, interest and costs. Although this point of law was not taken until after judgment had been delivered on the issue of quantum of damages. I agree with the Vice-President that in all the circumstances it is proper to consider it. It was argued on behalf of the third party that there were two judgments, a preliminary and a final, and that the dismissal of the appeal on the preliminary did not take away the statutory right of appeal on the final. This is of course true so far as any new matter was decided in the final decree, which was, however, only concerned with damages, and not with liability. The question of liability had been decided, whether rightly or wrongly, in the preliminary judgment, and in the final judgment it was only a matter of applying that liability to the damages awarded, a mere mathematical calculation. It was not, therefore, in my opinion, competent for the third party to appeal at this late stage on what was decided by the preliminary decree, a decision which could have been made a ground of appeal in the first appeal to this court.

Owing to the view I take of the nature of the pleadings between the defendants and the third party and the orders which arose therefrom, I find myself unfortunately unable to agree with the Vice-President (whilst otherwise agreeing with him in all respects) that it could be said that the preliminary judgment had not applied to the third party in suit 833. Nor do I think that, if it did apply, it could now be challenged. Apart from the period prescribed by rules within which an appeal must be filed, s. 70 of the Civil Procedure Ordinance Cap. 6 of the Laws of Uganda reads:

“Where any party aggrieved by a preliminary decree does not appeal from such decree, he shall be precluded from disputing its correctness in any appeal which may be preferred from the final decree.”

That being so, the appeal, in my opinion, should be dismissed with costs. That does not mean that I am not surprised that a reputable party which stands to benefit from third party proceedings which should never have been instituted (although such was not presumably realised at the time) should, in the circumstances of this case, insist on taking advantage of the third party itself having failed to realise until (in my opinion) too late that the proceedings were wrongly brought.

Appeal dismissed.

For the appellant:

Wilkinson & Hunt, Kampala

R. E. Hunt

For the respondent:
Hunter & Greig, Kampala
A. I. James

**Stirling Astaldi (Uganda) Ltd v The General Manager EAR & H
Administration**
[1964] 1 EA 396 (CAN)

Division: Court of Appeal at Nairobi
Date of judgment: 29 July 1964
Case Number: 86/1963
Before: Sir Trevor Gould, Crabbe and Duffus JJA
Sourced by: LawAfrica
Appeal from: The Supreme Court of Kenya – Rudd, J.

[1] Carriage by railway – Carriage of goods – Carriage of machine of exceptional weight and size – Machine properly secured to wagon – Clearance when loaded ample to avoid collision – Machine damaged in transit – Evidence of interference with machine affecting clearance – No evidence as to persons responsible – Distinction between “wilful misconduct” and negligence or accident – Liability of railway.

Editor’s Summary

The appellant sued the respondent in respect of damage caused to a scraper, consigned by the appellant from Port Bell to Nairobi, while in transit by rail. The scraper was carried by the respondent on conditions applicable to goods of exceptional weight and size and it was common ground that the respondent was not liable for any damage “except upon proof that the same arose from the wilful misconduct of its employees”. The scraper was properly secured to a railway bogey and its extreme height was such that it should have had ample clearance in transit. Nevertheless it came into violent contact with an overhead bridge. There was no evidence as to how the accident happened but it was clear that someone had somehow raised the arm of the scraper which would raise its height. The judge dismissed the action on the ground that the appellant had failed to prove that the damage to the scraper was caused by wilful misconduct on the part of the respondent’s servants or agents. On appeal,

Held – there was no evidence that the accident occurred more probably through wilful misconduct of the respondent’s employees than through some other cause; accordingly the appeal must be dismissed.

Appeal dismissed.

Cases referred to in judgment:

(1) *Lewis v. Great Western Railway Co.* (1877), 3 Q.B.D. 195.

- (2) *Re Equitable Fire Insurance Co., Ltd.*, [1925] 1 Ch. 407.
- (3) *Forder v. Great Western Railway Co.*, [1905] 2 K.B. 532.
- (4) *Benmax v. Austin Motor Co., Ltd.*, [1955] A.C. 370; [1955] 1 All E.R. 326.
- (5) *H. C. Smith v. Midland Railway* (1919), L.J.K.B. 868.
- (6) *Haynes v. Great Western Railway Co.* (1879), 41 L.T. 436.

The following judgments were read:

Judgment

Sir Trevor Gould VP: This is an appeal from a judgment and decree of the Supreme Court of Kenya at Nairobi dated July 31, 1963, dismissing an action by the appellant company against the respondent, which is a corporation sole established under the East African Railways and Harbours Act (Cap. 3, Laws of the High Commission Revised Edn., 1951). It is unnecessary to set out the pleadings, but the action was brought in respect of damage caused

to a Le Tourneau scraper consigned by the appellant from Port Bell in Uganda to Nairobi in Kenya while in transit on the railway of the respondent. The scraper was carried by the respondent on conditions applicable to goods of exceptional weight and size, concerning which I need only say that it has been common ground throughout the litigation that the respondent cannot be made liable for any damage “except upon proof that the same arose from the wilful misconduct of its employees”. The learned judge in the Supreme Court held that the appellant company had failed to discharge that onus.

There is little dispute about the surrounding circumstances. The scraper in question was a large machine, and one portion of it is called a scraper arm. The total height of the machine varies according as the blade on this scraper arm is down or raised; the height is at its least when the blade is down and at its greatest when the blade is up – a variation of some eighteen inches. The evidence is that the scraper was loaded onto a bogey on February 22 or 23, 1962, and secured with wire ropes by the appellant company’s workmen. The bulk of the evidence, including the written record of the respondent, indicates that five ropes were used. It was stated in some of the evidence for the appellant company that more were added at the respondent’s request but there may be confusion between the relevant machine and another sent in April, 1962. I do not think the point is material view of the learned judge’s findings. Measurements taken by the respondent’s employee after loading indicated that the extreme height of the load was fourteen feet one inch. The bogey remained at Port Bell until the train left, which was on or after March 2, 1962. Some distance from Kampala the scraper came into violent contact with an overhead bridge; it was severely damaged and knocked right back onto the next bogey to the rear. The point of impact was about three-quarters of the way under the bridge in the direction in which the train was moving and measurements showed that the height of the underneath part of the bridge from the rail was fourteen feet eleven inches on the Kampala side and fourteen feet ten inches on the Nairobi side.

What a plaintiff must prove in order to succeed in a claim on the basis of wilful misconduct has been considered in a number of cases. There is a well known passage in the judgment of Bramwell, L.J., in *Lewis v. Great Western Railway Co.* (1) ((1877) 3 Q.B.D. 195 at 206), which reads:

“‘Wilful misconduct’ means misconduct to which the will is a party, something opposed to accident or negligence; the *misconduct*, not the conduct, must be wilful. It has been said, and, I think, correctly, that, perhaps, one condition of ‘wilful misconduct’ must be that the person guilty of it should know that mischief will result from it. But to my mind there might be other ‘wilful misconduct’. I think it would be wilful misconduct if a man did an act not knowing whether mischief would or would not result from it. I do not mean when in a state of ignorance, but after being told, ‘Now this may or may not be a right thing to do’. He might say, ‘Well, I do not know which is right, and I do not care; I will do this’. I am much inclined to think that that would be ‘wilful misconduct’, because he acted under the supposition that it might be mischievous, and with an indifference to his duty to ascertain whether it was mischievous or not, I think that would be wilful misconduct.”

In *Re City Equitable Fire Insurance Company, Ltd.* (2) Pollock, M.R., said ([1925] 1 Ch. 407 at 417):

“Lord Alverstone in *Forder v. Great Western Ry. Co.* (3), a later case, adopting the definition given in an Irish case, with which he expressed his agreement, says: “‘Wilful misconduct in such a special condition means misconduct to which the will is party as contradistinguished from accident,

and is far beyond any negligence, even gross or culpable negligence, and involves that a person wilfully misconducts himself who knows and appreciates that it is wrong conduct on his part in the existing circumstances to do, or to fail or omit to do (as the case may be), a particular thing, and yet intentionally does, or fails or omits to do it, or persists in the act, failure or omission regardless of consequences.” The addition which I would suggest is, “or acts with reckless carelessness, not caring what the results of his carelessness may be”.’ For my own part, I agree with that definition quoted by Lord Alverstone, with the addition he proposes to make to it.”

In the present case the available basis of inference as to the cause of the accident is so meagre and vague that I doubt whether, beyond noting that wilful misconduct involves a deliberately or recklessly wrongful act and is to be distinguished from negligence or accident, the court is further concerned with nicety of definition.

The judgment of the learned judge in the Supreme Court was brief and reads as follows:

“This is a most puzzling case because on the evidence the scraper should easily have cleared the bridge. I have thought about it a lot both at the original hearing and since, as well as throughout the proceedings today, and indeed at times in the interval between these hearings. I think it is clear that the arm of the scraper must somehow or other have been raised. No one has any idea how that happened and it seems most improbable. If the accident had not happened no one would have conceived it in any way probable that the arm would rise or would be raised to the extent that it must have risen. It rises with the bowl or blade. The loaded truck was in railway custody from the time it was loaded until the accident, but no one knows how it was raised, or if it was deliberately raised, why it was raised. I cannot see any probable reason as to why it should have been deliberately raised.

“The whole case is completely puzzling to me and, I believe, to all concerned. I am not happy about it. But the onus is fairly and squarely upon the plaintiff to establish that the injury was due to wilful misconduct on the part of the railway or its servants or agents. I doubt that there was actual wilful misconduct on any one’s part for there seems to be no reason for it. There may have been improper conduct but that is not the same thing and in any case I am not to be taken as holding that there was certainly improper conduct. I simply do not know what caused the rising of the arm of the scraper and while I have the very greatest sympathy with plaintiffs who did absolutely nothing wrong, I find myself unable to hold that the loss was due to wilful misconduct as explained by LORD BRAMWELL in Smith’s case, or as explained in the other cases cited to me, on the part of the Railway’s servants or agents.

“I must, therefore, dismiss the suit with costs.”

With respect, it would have been more helpful if the learned judge had set out such primary facts as he found proved, instead of leaving them to be inferred. It is clear from his reference to the plaintiffs (whose servants secured the machine to the bogey) having done nothing wrong, that he accepted that the securing was properly done. His inference that the scraper arm must have been somehow raised must have been based upon a primary finding that the measurements given by the respondent’s employee were correct, from which it followed that the machine, without movement after loading, would have had at least nine inches clearance below the bridge. Beyond those two primary findings there is nothing but inference (if legitimate inference is in fact possible) and in that

sphere this court is in as good a position as was the learned judge to arrive at its own conclusions – see *Benmax v. Austin Motor Co., Ltd.* (4).

The contention of counsel for the appellant company before this court was that a prima facie case had been made out by the evidence of secure fastening at Port Bell. As the learned judge considered that the arm of the scraper must have been raised counsel submitted that, on the evidence, the arm must have been raised by some person deliberately, and, as the machine was in the custody of the respondent from the time of loading, the reasonable inference was that the person was an employee of the respondent. Those circumstances, he continued, shifted the onus to the respondent, particularly as having the custody of the machine placed the means of knowledge of the cause of the movement of the arm peculiarly with the respondent.

This argument by counsel was based largely on a premise which in my own view is not sustainable and which, I think, was not accepted by the learned judge. The premise is that the evidence showed that the arm of the scraper could only have been raised by the use of the power control unit, a separate power unit which did not accompany the machine. The flimsy foundation for this is a statement in evidence by Enea Marcheselli, a witness for the appellant company, as follows:

“I don’t remember if the scraper blade was right down. Normally it would be right down. In this case the blade would be down. No P.C.U.”

Counsel called in aid the judge’s note that opposing counsel had said in argument – “Marcheselli said blade could not have been up without P.C.U.” This however, is largely offset by counsel’s own submission in the Supreme Court that it could have been lifted with jacks. As to the learned judge’s view, if the arm was raised by use of a power control unit the raising must have been deliberate, and the learned judge would not have said (as, in his judgment, he did) “. . . but no one knows how it was raised, or if it was deliberately raised, why it was raised.” In my opinion it is unsafe to draw anything from what Marcheselli is recorded as saying, further than that there was no power control unit with the machine and the normal position of the blade in the absence of such a unit is right down.

As I have indicated, I do not accept counsel’s premise as valid, but if it were to be accepted I do not consider it follows that a prima facie case of wilful misconduct is established on the part of the servants of the respondent. If it was established that those servants did raise the machine or any part of it after it was secured, the circumstances proved might well be such as to shift the onus to the respondent to show that such an action did not constitute misconduct. But if, as counsel suggests, the arm could only be raised by a power control unit and there was none with the machine, one is embarking upon consideration of possibilities of such extreme unlikelihood that I fail to see any greater probability that the act was done by a servant of the respondent than by someone else. The person concerned would need first to procure a power control unit for the purpose. In those circumstances the suggestion that someone might have tampered with the machine through curiosity can be discarded as nonsensical. The act must have been deliberate and as counsel for the respondent pointed out, someone connected with the appellant company would be far more likely to have a power control unit available to him than would a railway employee. Such a person would also be more likely to have a motive to do damage to the appellant company than a railway employee. Counsel for the appellant company relied upon the fact that the machine was in the custody of the respondent and upon the case of *H. C. Smith Lim v. Midland Railway* (5). That case is, I consider, distinguishable. It was concerned with the theft of two pairs of shoes while in railway custody. The manner of the theft, including the repacking

of the empty boxes, was far more consistent with the theft having been committed by a railway servant than by that of a member of the public whose opportunities of access were extremely limited. In the present case the machine was in the railway yards at Port Bell for a week or more and it cannot be assumed that only railway staff would have had access to it.

I do not think this submission, even if the premise were accepted, could resolve the appeal in favour of the appellant company. As I have said, I do not accept it, and, even considering the question on the basis that the use of a power control unit provides one method of raising the arm of the scraper, I consider that the possibility that anyone at all brought such a unit to the machine after it had been secured, raised the arm and presumably secured it so that it would not resume the “down” position when the unit was removed, borders on the realm of fantasy.

As I have indicated, the learned judge did not exclude possible causes of the accident which were other than deliberate. In this, in my respectful opinion, he was correct. It is a pity that no photograph of the machine, or of a facsimile, was put in evidence or that evidence in detail by experts was not given, relative to the force which might be required to raise the blade. Whether severe jolting of the train could accomplish this is not in evidence, and the lack of evidence of this nature must be laid at the door of the appellant company, upon which the general onus lay. Expert evidence on the other hand, is not required to show that fastenings, apparently satisfactory when made, may slip and the wires by which a seven ton load is secured may part. In my opinion any theories which may be founded on the primary facts established in this case savour more of speculation than legitimate inference but insofar as they may be regarded as inferences I would regard as more likely those which favour accident rather than those which are said to point to deliberate acts on the part of the respondent’s employees. In either case the appeal must fail, as it has not been shown that it was more probable that the accident arose from the wilful misconduct of the respondent’s employees than from some other cause – see *Haynes v. Great Western Railway Co.* (6).

I would therefore dismiss the appeal with costs.

Crabbe JA: I agree with the judgment of the learned Vice-President and with the order proposed by him.

Duffus JA: I also agree and have nothing to add.

Appeal dismissed.

For the appellant:

Sampson & Ransley, Nairobi

R. N. Sampson

For the respondent:

The Legal Secretary, E. A. Common Services Organization

A. M. Akiwumi (Legal Secretary, E. A. Common Services Organization)

Division: Court of Appeal at Nairobi
Date of judgment: 7 August 1964
Case Number: 23/1964
Before: Crabbe JA
Sourced by: LawAfrica

[1] Jurisdiction – Court of Appeal – Bankruptcy – Receiving order made – Application for stay of proceedings refused – Appeal to Court of Appeal – Notice of appeal against receiving order filed – Record of appeal not lodged – Application to appellate court for stay pending appeal – Whether application competent.

Editor’s Summary

The respondent presented a bankruptcy petition against the applicant upon which a receiving order was made. The court refused an application under s. 108 of the Bankruptcy Act for a stay of advertisement and all proceedings under the receiving order whereupon the applicant filed a notice of appeal against the receiving order. Before lodging the record of appeal, the applicant applied to the Court of Appeal for a stay of proceedings pending the hearing of the appeal. When this application was heard it was argued for the respondent that the application was misconceived and incompetent, that the court had no jurisdiction to hear an application for stay of proceedings consequent upon a receiving order and that there was no pending appeal before the court. For the applicant it was submitted that there was an appeal pending once the appeal had been commenced and that an appeal is commenced when notice of appeal is filed.

Held –

- (i) r. 56 of the Eastern African Court of Appeal Rules 1954 is purely procedural and does not affect a right of appeal under the substantive law; it only provides that a notice of appeal can be given before any formal decree or order is drawn up;
- (ii) since the applicant had not satisfied the requirements of r. 58 of the Eastern African Court of Appeal Rules 1954 there was no appeal pending and the application was incompetent.

Application dismissed.

Cases referred to in judgment:

- (1) *Sheikh M. Bashir v. Commissioner of Income Tax* (1961), E. A. 240 (C.A.).
- (2) *Motel Schweitzer v. Cunningham & Tucker* (1955), 22 E.A. 252.
- (3) *Brooks & Lefevre v. Silin* (1941), 2 W.W.R. 52.

Judgment

Crabbe JA: The application in this matter was for an order that: “(1) The advertisement and of all proceedings under the Receiving Order made on June 19, 1964, be stayed until pending filing appeal and

hearing and decision – thereof against the said Receiving Order made by the senior resident magistrate, H. G. Sherrin, Esq., in exercise of bankruptcy jurisdiction; (2) that the costs of this application abide the result of the said intended appeal.”

The circumstances from which this application arose are that on April 24, 1964, the Commissioner of Income Tax, Mr. James Louis Pembroke, presented a petition against the applicant in Bankruptcy Cause No. 14 of 1964. The petition was heard by the senior resident magistrate, H. G. Sherrin, Esq., in

the exercise of Bankruptcy Jurisdiction, on June 12, 1964, and on June 19, 1964 he made a Receiving Order against the applicant. Thereupon the applicant made an application under s. 108 of the Bankruptcy Act, (Cap. 53) to the learned senior resident magistrate for the stay of advertisement and of all proceedings under the Receiving Order. This application was heard on June 23, 1964, and was refused. On the instructions of the applicant counsel filed on his behalf a notice of an intention to appeal in this court on June 26, 1964.

Counsel for the Commissioner of Income Tax at the hearing of the present application, raised an objection in limine on the ground that the application was misconceived and incompetent, and that the court had no jurisdiction to hear an application for stay of all proceedings consequent upon a Receiving Order. He referred to the notice of motion which is headed "In the Matter of an Intended Appeal" and submitted that there was no pending appeal. He submitted further that the jurisdiction of this court was derived from art. 33b 1 of Subsidiary Legislation No. 15 of 1962 (L.N. 95) and from s. 3 of the Kenya Appellate Jurisdiction Act, 1962, and that the present application did not come within the interpretation of "Appeal" in r. 2 (1), Part I of the Eastern African Court of Appeal Rules, 1954.

In Kenya appeals from decisions in bankruptcy proceedings are regulated by s. 103 of the Bankruptcy Act.

Section 103 reads as follows:

- (1) the court may at any time review, rescind or vary any order made by it.
- (2) Orders of the court in bankruptcy matters shall, at the instance of the person aggrieved, be subject to appeal, but no appeal shall be entertained except in conformity with such rules as may for the time being in force in relation to the appeal.
- (3) Where by this Ordinance an appeal to the court is given against any decision of the official receiver, the appeal shall be brought within twenty-one days from the time when the decision appealed against is pronounced or made.

Rule 97 of the Bankruptcy Rules is in these terms:

"Subject to the foregoing provisions of these Rules, appeals to the Court of Appeal shall be regulated by the Eastern African Court of Appeal Rules, 1954."

Counsel for the respondent contended that the word "court" in s. 108 of the Bankruptcy Act meant only the court which had original jurisdiction in bankruptcy proceedings, and that this court of appeal could exercise the powers of stay conferred by s. 108 only if there was an appeal pending. For this contention counsel for the respondent relied on the case of *Sheikh M. Bashir v. Commissioner of Income Tax* (1) in which Sir Alastair Forbes, V.-P., said ((1961), E. A. (C.A.) at p. 242):

"... He (counsel for the applicant) argued at first that this court was seised of the powers conferred by s. 107 of the Bankruptcy Ordinance. He referred to r. 53 of the Eastern African Court of Appeal Rules, 1954 (hereinafter referred to as 'the Appeal Rules') and argued that though the powers under s. 107 of the Bankruptcy Ordinance were vested in the supreme court in the first instance, nevertheless this court had concurrent jurisdiction with the supreme court and could exercise the powers of the court under that section. He subsequently argued that this court would, in any case, have power to make the order applied for under s. 6 (b) of the Privy Council

Order in Council. As regards s. 107 of the Bankruptcy Ordinance, we have no doubt that we have no jurisdiction at this stage to order a stay of proceedings under that section. Jurisdiction under that section is vested 'in the court' and the court is defined in the Bankruptcy Ordinance as the court having jurisdiction in bankruptcy, that is to say, in the instant case, the Supreme Court. Section 16 of the Eastern African Court of appeal Order in Council, 1950, which confers jurisdiction to hear appeals on this court, provides, inter alia, that '... for all purposes of and incidental to the hearing and determination of any appeal within its jurisdiction, the court shall have the power, authority and jurisdiction vested in the court from which the appeal is brought.' It is clear that the powers possessed by the supreme court are only vested in this court in relation to the hearing and determination of an appeal to this court. Rule 53 of the Appeal Rules also applies only where an appeal to this court is pending. There is here no appeal to this court pending since the appeal to this court has already been determined. The court is, therefore, not in a position to exercise the powers vested in the supreme court by virtue of s. 107 of the Bankruptcy Ordinance."

Section 107 is now s. 108 of the Bankruptcy Act, 1962.

Counsel for the applicant said that his duty was to satisfy this court that under the rules of the court it had jurisdiction to hear this application. His first submission was that there was an appeal pending once the appeal had been commenced and that an appeal was commenced when the first procedural step was taken to initiate it. The procedure laid down by the rules of this court is a notice of appeal in the form set out in Form D in Schedule 1 to the Eastern African Court of Appeal Rules, 1954. Thereafter, counsel for the applicant further contended, r. 58 would apply. This rule reads:

"Subject to any extension of time and to any order made under r. 82 of these Rules, the appellant shall within sixty days after filing notice of appeal lodge the appeal by filing in the registry of the court four copies of the record of appeal paying the prescribed fee and lodging in court the sum of fifteen hundred shillings as security for the costs of the appeal."

In counsel for the applicant's submission this court was not bereft of jurisdiction during the sixty days because r. 56 showed that an application could be made within that period provided it related to an intended appeal of which notice had been given. He contended that if the notice of appeal was not a first step in initiating an appeal it would be difficult to give any meaning to r. 56.

In my view the meaning of r. 56 is very plain. The rule is purely procedural and does not affect a right of appeal under the substantive law. It only provides that a notice of appeal can be given before any formal decree or order is drawn up; see *Motel Schweitzer v. Cunningham and Tucker* (2) ((1955), 22 E.A. 252 at p. 254).

In support of his main argument that there was an appeal pending in this matter counsel for the applicant called in aid a quotation from a Canadian case which is reproduced as follows in *Words and Phrases (Judicially Defined)* Vol. 1, p. 211:

"A person 'appeals' when he formally gives notice to the opposite party of his intention to appeal although he does not in fact comply with the condition precedent required to bring the appeal on for hearing – *Brooks & Lefevre v. Silin* (3), per Matheson, D.C.J. ((1941), 2 W.W.R. at p. 58)."

Counsel for the applicant then tried to distinguish the facts of this case from those of *Sheikh M. Bashir v. Commissioner of Income Tax* (1) (supra) mainly on the ground that in that case no step had been taken to initiate an appeal at

the time of the application whereas in the present case the applicant had actually taken the first step by filing a notice of intention to appeal in accordance with the rules of this court. To that extent I find myself in entire agreement with counsel for the applicant, and in my judgment the *Bashir case* (1) is not of much assistance in the determination of the crucial question whether there is an appeal pending in this case.

If this question were *res integra* I would consider the Canadian case of great persuasive value. Unfortunately, counsel for the applicant was not able to refer me to the relevant rules that govern appeals in Canada; and moreover, I think that the case of *Motel Schweitzer v. Cunningham and another* (2) (supra) is decisive against his main contention. In that case it was said at p. 254:

“In Kenya when the notice refers to a judgment leading to a decree, it is a notice of intention to exercise a right of appeal which has come into existence. The notice is a document filed in the proceedings in the superior court and in no case is the appeal instituted until the record of appeal is lodged in the registry of this court, the prescribed fees paid and security lodged as provided in r. 58. The later part of r. 56 therefore, merely provides that in every case the formal decree or order is to be drawn up before the appeal is lodged in order that the record shall be complete and shall comply with the requirement of r. 62(4)(e).”

The applicant has filed only a notice of appeal, but since he has not satisfied the requirements of r. 58 I think there is no appeal pending. It follows therefore that his application to this court is incompetent, and I refuse it accordingly.

Application dismissed.

For the applicant:

J. J. & V. M. Patel, Nairobi

Bryan O'Donovan, Q.C. and *J. J. Patel*

For the respondent:

The Legal Secretary E.A.C.S.O

M. G. Muli (Asst. Legal Secretary, East African Common Services Organization)

For the Official Receiver:

The Official Receiver, Kenya

M. L. Handa (Deputy Official Receiver, Kenya)

Woodruff v Dupont
[1964] 1 EA 404 (CAN)

Division:	Court of Appeal at Nairobi
Date of judgment:	11 August 1962
Case Number:	85/1962
Before:	Sir Samuel Quashie Idun, Sir Daniel Crawshaw and Crabbe JJA
Sourced by:	LawAfrica

Appeal from: The Supreme Court of Kenya – Templeton, J.

[1] Damages – Remoteness – Breach of contract – Loss of profit and publicity – Contract to conduct safari by professional hunter – Safari cancelled – Hunter employing other hunters at own costs for publicity purposes – Client not informed of employment of other hunters – Measures of damages.

Editor's Summary

The appellant, who was a professional hunter, agreed to conduct a safari for the respondent for a sum of Shs. 52,500/-. The safari was to last two and a half months. The respondent paid a deposit of Shs. 17,850/- but later informed the appellant that he had cancelled his plans for the safari. The appellant then sued the respondent claiming damages inter alia for loss of goodwill and publicity amounting to Shs. 26,375/-. In support of his claim the appellant stated that he had engaged 14 African assistants and two white hunters to whom he had paid

Shs. 11,450/- in anticipation of the safari and was morally bound to pay a further sum of Shs. 8,425/- to them; the two white hunters had been engaged for publicity value, and the appellant did not expect the respondent to pay for them because, as far as the respondent was concerned, he was going on safari with the appellant alone. The respondent's defence was inter alia that the sum deposited was sufficient to satisfy the appellant's claim. The trial judge held that the appellant was only entitled to claim Shs. 2,950/- in respect of the African employees but was not entitled to claim as against the respondent the amount paid or agreed to be paid to the two white hunters either as damages arising naturally from the breach of the contract or as damages such as might reasonably be supposed to have been contemplated by the appellant and the respondent. In respect of the appellant's claim for loss of publicity the judge held that there was no evidence before him which would justify an award of damages and that the sum of about Shs. 15,000/- being the difference between the amount legitimately expended by the appellant and the amount of the deposit was sufficient to cover any loss suffered by the appellant. On appeal,

Held –

- (i) the claims for damages which were disallowed by the trial judge were claims which were in the circumstances not reasonably foreseeable or within the knowledge of the respondent and the trial judge was right in coming to the conclusion that the appellant had failed to establish his claims that he had legitimately incurred expenses and had suffered a loss of profit for which the respondent was liable to reimburse him;
- (ii) the trial judge was right in disallowing the claim for damages for loss of publicity because the respondent had not given any undertaking to bear any such special loss and the appellant himself had not expected the respondent to bear such a loss.

Appeal dismissed.

Cases referred to in judgment:

- (1) *Victoria Laundry (Windsor), Ltd. v. Newman Industries, Ltd.*, [1949] 1 All E.R. 997; [1949] 2 K.B. 528.
- (2) *Marbe v. George Edwardes (Daly's Theatre), Ltd.*, [1928] 1 K.B. 269.
- (3) *Clayton and Waller, Ltd. v. Oliver*, [1930] A.C. 209; [1930] All E.R. Rep. 414.
- (4) *Hadley v. Baxendale* (1854), 9 Ex. 341; 156 E.R. 145.
- (5) *Aerial Advertising Co. v. Batchelors Peas Ltd. (Manchester)*, [1938] 2 All E.R. 788.
- (6) *British Westinghouse Electric and Manufacturing Co. Ltd. v. Underground Electrical Railways Co. of London Ltd.*, [1912] A.C. 673; [1912] All E.R. Rep. 63.
- (7) *Monarch S.S. Co. v. A/B Karlshamns Oljefabriker & Others*, [1949] 1 All E.R. 1.
- (8) *Gee v. Lancashire and Yorkshire Rlwy. Co.* (1860), 6 H. & N. 211.
- (9) *Turner v. Sawdon & Co.*, [1901] 2 K.B. 653.
- (10) *Fechter v. Montgomery* (1863), 33 Beav. 22.
- (11) *British Columbia Saw Mills Co. v. Nettleship* (1868), L.R. 3 C.P. 499.

The following judgments were read:

Judgment

Sir Samuel Quashie-Idun P: This is an appeal against a judgment of the Supreme Court of Kenya in which Templeton, J., dismissed a claim instituted by the plaintiff-appellant against the defendant-respondent for damages for a breach of contract.

The facts of the case are sufficiently set out in the judgment of the learned trial judge, but, briefly, they are as follows:

On May 18, 1961, the appellant, who is a professional hunter and a safari outfitter, at the request of one Stasche agreed to conduct a safari for the respondent in consideration of the payment of the sum of Shs. 52,500/- by the respondent to the plaintiff. The safari was to last two and a half months commencing from January 15, 1962 and the appellant was to provide all equipment, provisions, staff and other necessary matters for the said consideration with the exception of alcoholic drinks, tobacco and hunting licences.

The respondent paid to the appellant a deposit of Shs. 17,850/- in respect of the contract. On November 23, 1961, the appellant received a letter from Stasche informing the appellant that the respondent had cancelled his plans for the safari. The appellant therefore instituted the present action claiming damages amounting to Shs. 26,375/-, particulars of which were set out in the plaint and which included damages for loss of good will and publicity. While not admitting that there was a breach of the contract on his part the respondent averred in his statement of defence that if the appellant had suffered any damages as a result of the alleged breach complained of, the strict proof of which the respondent would put the appellant, then the sum of Shs. 17,850/- which was paid to the appellant as a deposit, was sufficient to satisfy the plaintiff's claim. The respondent also denied the claim of the appellant for damages for any loss of good will and publicity.

In support of his claim the appellant led evidence to show that in respect of the safari he paid to fourteen African assistants and to two white hunters a total sum of Shs. 11,450/-. This evidence was accepted by the learned trial judge.

The appellant also gave evidence that he was morally bound to pay a further sum of Shs. 8,425/- to the African assistants and to the two white hunters, even after the contract for the safari had been broken, as he contended that the amount paid as deposit by the respondent was not sufficient to cover his out of pocket expenses.

The appellant also stated that in respect of the two white hunters, he was to bear the entire cost for the purpose of the publicity which he would have derived from the safari and that as far as the respondent was concerned, the respondent thought he was going to safari with the appellant alone. He did not expect the respondent to pay for the two white hunters and that he had engaged them for the publicity value.

One of the white hunters, Wincza, who gave evidence for the appellant, stated that there was no arrangement between himself and the appellant regarding the balance of Shs. 1,500/- which the appellant alleged he had to pay to witness after the cancellation of the said safari. He stated further that he was not able to claim the amount of Shs. 1,500/- for the appellant as the appellant had lost the safari after paying the witness a very considerable advance.

On the evidence adduced on this issue, the learned trial judge held that the appellant was not entitled to claim as against the respondent the amount paid and agreed to be paid to the two white hunters either as damages arising naturally for the breach of the contract or as damages such as might reasonably be supposed to have been contemplated by the appellant and the respondent.

In respect of the claim for payment to the African assistants the learned trial judge held on the evidence and in the circumstances that the payment of a month's salary to each of the African employees amounting to Shs. 2,990/- was a legitimate charge on the defendant's safari. The learned trial judge,

however, disallowed the appellant's claim for the sum of Shs. 4,425/- which the appellant stated he was morally bound to pay to the African employees after the safari

had been cancelled. The reason for the learned trial judge disallowing that part of the claim was that the appellant had had seven weeks notice of the cancellation of the safari and he could easily have given that notice to his African employees.

In respect of the appellant's claim for damages for loss of publicity, the learned trial judge was not satisfied that there was evidence before him which would justify an award of damages.

Finally, the court held that the sum of approximately £750 or Shs. 1,500/-, being the difference between the amount legitimately expended by the appellant and the amount of deposit, was sufficient to cover any loss suffered by the appellant. The court, therefore, dismissed the appellant's claims.

A number of grounds of appeal were filed in this court but the learned judge's decision has been attacked on the following grounds:

- (1) That the learned trial judge misdirected himself when he held on the evidence that the deposit paid by the respondent to the appellant was more than sufficient to cover the respondent's legitimate expenses and loss of profits.
- (2) That the learned trial judge misdirected himself on the issue of loss of damages for loss of publicity.

In respect of the first ground argued, it was submitted that the learned trial judge failed to consider that in law it was the duty of the court to place the appellant, who had suffered damages as a result of a breach of contract, in a position he would have been if the contract had not been broken and not to place him in the position in which he was before or at the time he entered into the agreement. A number of authorities were cited by counsel for the appellant in support of his submission, which, in my view, are not necessary to be quoted in this judgment. I agree that it is a well established principle in law that in a claim for damages for breach of contract, the party to the contract who is not guilty of such breach is to be placed, financially, in the position in which he would have been if the contract had not been broken, and if he had been allowed to carry out his part of the contract. But, as counsel for the respondent pointed out during his submissions in answer to those made on behalf of the appellant, a party who claimed damages for breach of contract should mitigate the damage he had suffered by reason of the breach committed by the other party to the contract and also prove that he has suffered the damage he claims. Learned counsel further submitted that at the trial the plaintiff had not only sought to inflate the damages he alleged he had suffered but had also failed to prove them. In the case of *Victoria Laundry (Windsor) Ltd. v. Newman Industries Ltd.* (1), to which both counsel referred in their submissions, Asquith, L.J., stated in his judgment as follows ([1949] 1 All E.R. at p. 1002).

"In cases of breach of contract the aggrieved party is only entitled to recover such part of the loss actually resulting as was at the time of the contract reasonably foreseeable as liable to result from the breach. What was at that time reasonably foreseeable depends on the knowledge then possessed by the parties, or, at all events, by the party who later commits the breach."

In the present case, the evidence which was led by the appellant in respect of his claims which were disallowed by the learned trial judge could not be held to support the appellant's contention that the circumstances were reasonably foreseeable or within the knowledge of the respondent. I am, therefore, of the view that the learned trial judge did not misdirect himself either in law or on the evidence and that he was right in coming to the conclusion that the appellant

had failed to establish his claims that he had legitimately incurred expenses and had suffered a loss of profits for which the respondent was responsible to reimburse him.

In respect of the claim for damages for the alleged loss of publicity, learned counsel for the appellant also referred to a number of cases which I do not think it is necessary to refer to in this judgment. The cases cited refer to loss of publicity occasioned by breaches of contract entered into by parties engaged in theatre work and publications.

In the case of *Marbe v. George Edwardes (Daly's Theatre) Ltd.* (2), Bankes, L.J., stated in his judgment as follows ([1928] 1 K.B. at p. 281):

"In my opinion it is sufficiently established that where there has been a breach of a contract to employ an actress, whose reputation depends on the continued and successful practice of her art, and where the engagement is accompanied by promises of widespread publicity and advertisement which will probably lead to future opportunities following on successful performance, the court recognises that the damages for that breach may properly include such a sum as a jury may award to compensate the plaintiff for the loss of the reputation which would have been acquired, or damage to reputation already acquired, or, to use another expression, for loss of publicity."

But in the case of *Clayton and Waller Ltd. v. Oliver* (3), the House of Lords was of the opinion that the judgment of Bankes, L.J., in *Marbe v. Edwardes (Daly's Theatre) Ltd.* (2), (supra) had gone too far.

Lord Buckmaster stated in the *Oliver* case (3) (supra) that theatrical contracts were something more than a mere contract on the actor's part to render service.

In the present case a letter addressed to the appellant by Mr. A. R. Stasche dated March 29, 1961, was relied upon by counsel for the appellant in his submission before this court as showing that it was contemplated by the parties that the appellant would gain some publicity from the performance of the contract. But as was pointed out by counsel for the respondent, the contents of that letter were unknown to the respondent and it appears that the first time the respondent saw it was when it was produced at the trial court.

In view of the appellant's evidence and the fact that the letter from Mr. Stasche referred to in this judgment contained matters which were clearly not in contemplation of the parties, I think the learned trial judge was justified in disallowing the claim for damages for any loss which the appellant alleged he had suffered in respect of the alleged loss of publicity.

I am of the view that the appellant has failed to satisfy this court that the decision of the learned trial judge is wrong and I would accordingly dismiss the appeal with costs.

Sir Daniel Crawshaw JA: I have had the advantage of reading the judgments of my brother judges and agree that this appeal must be dismissed with costs.

Counsel for both sides agree that the damages should be assessed on the difference between the contract charge for the safari of Shs. 53,550/- less the cost thereof to the appellant; this balance would be the profit the appellant could have expected to make had the safari taken place in accordance with the contract. That the respondent was in breach of the contract in cancelling the safari is not now in dispute; nor is the question of mitigation of damages in issue in this appeal.

The judgment of the learned judge was criticised by both counsel. He did not specifically attempt to assess what profit the appellant could have expected to

make, for he did not in any great detail consider the probable expenses of the appellant or other proper deductions which the appellant should have made from the contract price. What he did do was to find what actual sum the appellant had in hand, taking into consideration the deposit of Shs. 17,850/- which the appellant had received from the respondent and deducting therefrom the out-of-pocket expenses which the appellant had incurred and had, under the contract, become legally liable to pay. The balance in hand was, in the opinion of the judge, sufficient to cover "loss of profit". The judge had, therefore, in mind the quantum of profit which the appellant could have expected to make had the safari taken place.

Had the learned judge approached the matter rather differently, by first considering the probable as well as the actual costs to the appellant and then taken the total thereof from the Shs. 53,550/- and against the balance given credit to the respondent for the amount of the deposit, he would still, as I read his judgment, have come to the same conclusion that the actual sum retained by the appellant from the deposit was sufficient to cover the total probable profit.

The learned judge appears to have accepted the actual payments of Shs. 11,450/- by the appellant to employees in anticipation of the safari as having been properly incurred and that a further Shs. 2,500/- would have had to be paid to an assistant "hunter", Mr. Engelbrecht, leaving Shs. 3,900/- in hand from the deposit. In addition to these actual liabilities there would, of course, have been (had the safari taken place) additional wages and salaries, costs of provisions and petrol and so on. The appellant in evidence said he was "prepared to have made as little as possible on this safari because of the publicity" and that is why he engaged two assistant hunters. The evidence as to what profit the organiser of a safari could, in ordinary circumstances, expect to make is therefore of little, if any, value. The two additional hunters were an extravagance indulged in at the appellant's expense in the hope of making the safari "one hundred per cent. successful" which, it would appear, was of more concern to the appellant in that particular safari, for publicity reasons, than was his profit motive.

It was, of course, still incumbent on the learned judge to try and ascertain what, if any, profit there would have been. As I have said, with respect, he did not go into this with the particularity he might have done but, on the evidence such as it was, I do not think that he could have come to any other conclusion than that the actual sum retained from the deposit was sufficient to satisfy any profit the appellant might have made from the safari had it taken place. The evidence of the appellant was sadly lacking in detail as to what deductions from the Shs. 53,550/- would have had to be made. For instance, his claim made no allowance for depreciation of the vehicles which would be needed on the safari. From his evidence this could amount to a very considerable sum, for he said that on a safari such as the one we are concerned with he would "put twenty-five per cent. depreciation on vehicles and equipment". There was no evidence as to the number and value of the vehicles which would have been used or the nature and value of the equipment.

For the reasons given by my brother judges I think that the judge was right to disallow any sum for damages for loss of publicity.

Crabbe JA: I also agree that the appeal must be dismissed and will only add a few observations on the main points in the case.

The appellant's claim was for damages for a breach of contract which deprived him of profits and publicity.

The substantial issues in this appeal, therefore, are (1) whether the learned trial judge was right in his assessment of the damages for loss of profits and (2) whether he was also right in not awarding damages for loss of publicity.

In dealing with the claim for damages for loss of profits the learned judge said:

“In the present case the plaintiff was fortunate enough to obtain a 33 per cent. deposit having asked for only 25 per cent. and, in my view the deposit he (had) should have been more than sufficient to cover legitimate expenses, and loss of profit when, as eventually happened, the safari was cancelled.”

It was conceded by counsel for the respondent that there was a breach, and counsel for the appellant submitted that the learned trial judge’s approach to the assessment of the damages for loss of profits was wrong, because he considered only the deposit of Shs. 17,850/- which the appellant received from the respondent and certain items of his expenditure without any reference to the contract price of Shs. 53,550/-. Counsel for the appellant submitted that on the facts as found by the trial judge the proper measure of damages was the amount of the contract price less the payment received on account and less expenses not incurred by the plaintiff. He submitted further that the principles which the learned judge should have applied to the facts before him were those laid down in the classic case of *Hadley v. Baxendale* (4).

These principles in *Hadley v. Baxenda* (4) (supra) were stated by Alderson, B., as follows:

“Now we think the proper rule in such a case is this: where two parties have made a contract which one of them has broken, the damages which the other party ought to receive in respect of such breach of contract should be either such as may fairly and reasonably be considered arising naturally, i.e. according to the usual course of things, from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties, at the time they made the contract, as the probable result of the breach of it. Now, if the special circumstances under which the contract was actually made were communicated by the plaintiffs to the defendants, and thus known to both parties, the damages resulting from the breach of such a contract, which they would reasonably contemplate, would be the amount of injury which would ordinarily follow from a breach of contract under these special circumstances so known and communicated. But, on the other hand, if these special circumstances were wholly unknown to the party breaking the contract, he, at the most, could only be supposed to have had in his contemplation the amount of injury which would arise generally, and in the great multitude of cases not affected by any special circumstances, from such a breach of contract. For, had the special circumstances been known, the parties might have specially provided for the breach of contract by special terms as to the damages in that case; and of this advantage it would be very unjust to deprive them.”

These submissions of counsel for the appellant seem at first blush to be formidable, for the proper measure of damages is not, as the learned trial judge appears to have done, that the plaintiff should be put back where he would have been if the contract had not been made. It was essential to estimate what the plaintiff would have had if the contract had been performed, and then to put him in that position, in so far as money could do that. In considering therefore the loss of profit in this case the plaintiff must be placed in the same position as if the safari had taken place on March 1, 1962: the full contract price would have to be paid and all other expenditure necessary for undertaking the safari would

have to be incurred before any profit could be earned at all. It is after this amount of loss of profit had been computed that the deposit of Shs. 17,850/- would be deducted in order to arrive at the sum due to the plaintiff.

In this case the learned trial judge found as a fact that the only expenditure actually incurred by the appellant amounted to Shs. 11,450/-. This expenditure was in connection only with payments made to various persons who were to be employed to assist the appellant. But in addition to this there must be expenditure for petrol, equipment and other items such as wear and tear and depreciation. On this aspect of the case the plaintiff said in his evidence as follows:

“I did not say anything about wear and tear on vehicles. I did say something about tyres. We allow so much for depreciation. I would not say that the major item of expenditure on safari is wear and tear and depreciation.

I claim from the Income Tax Department. It depends how much beating the lorries are taking. On a safari such as Mr. Dupont’s I would put 25 per cent. depreciation on vehicles and equipment on the value of the vehicles etc. I cannot say what the depreciation would be until a safari is finished. It depends on how many safaris I have done. On an average about 20 per cent.

On this particular safari the vehicles etc. didn’t go out on safari but a standing vehicle suffers a certain amount of depreciation. I have made no allowance in respect of amount saved on depreciation. The vehicles are rotting at my place.

I agree that I should make a depreciation allowance for Income Tax purposes but not in this case.”

It is plain therefore that the appellant failed to prove sufficiently what expenditure he would have incurred in order to earn his profit. It was incumbent upon the appellant to adduce all the material evidence to enable the court to quantify the damages that he claimed. As Atkinson, J. pointed out in *Aerial Advertising Co. v. Batchelors Peas Ltd. (Manchester)* (5), ([1938] 2 All E.R. 788 at p. 796): “Difficulty of proof does not dispense with necessity of proof.”

Counsel for the respondent submitted that though the reasoning of the learned judge is not as clear as one would wish, yet he reached the right conclusion in his assessment of the damages for loss of profits and that his judgment is fully justified by the evidence. He submitted further that the errors by the learned trial judge do not affect the result of the case.

There can be no doubt that the learned trial judge did not refer in his judgment to the case of *Hadley v. Baxendale* (4) (supra); but that is different from saying that he did not apply the principle in that case.

The question as to quantum of damages is one of fact for the trial judge, and the principles of law enunciated in the decided cases are only guides: per Lord Haldane, L.C. in *British Westinghouse Electric and Manufacturing Co. Ltd. v. Underground Electric Railways Co. of London, Ltd.* (6) ([1912] A.C. 673 at p. 688). In *Monarch S.S. Co. v. A/B Karlshamns Oljefabriker and Others* (7) Lord du Parc said ([1949] 1 All E.R.1 at p. 19):

“I do not doubt the wisdom of the judges who, in *Hadley v. Baxendale* (4) and the many later cases which interpreted or explained that classic decision, have laid down rules or principles for the guidance of those whose duty it is, as judges or jurymen, to assess damages. When those rules or principles are applied, however, it is essential to remember what my noble and learned friend, LORD WRIGHT, and LORD HALDANE in the passage cited by him have emphasised – that in the end what has to be decided is a question of fact, and, therefore, a question proper for a jury. Circumstances are so infinitely various that, however carefully general rules are framed, they must be construed

with some liberality and not too rigidly applied. It was necessary to lay down principles lest juries should be persuaded to do injustice by imposing an undue, or, perhaps, an inadequate, liability on a defendant. The court must be careful, however, to see that the principles laid down are never so narrowly interpreted as to prevent a jury, or judge of fact, from doing justice between the parties. So to use them would be to misuse them. It is interesting to find a judge of the experience of Wilde, B., six years after *Hadley v. Baxendale* (4) was decided, expressing a doubt which may well have been widely shared. He said in *Gee v. Lancashire and Yorkshire Railway Co.* (8):

‘For my own part I think that, although an excellent attempt was made in *Hadley v. Baxendale* (4) to lay down a rule on the subject, it will be found that the rule is not capable of meeting all cases; and when the matter comes to be further considered, it will probably turn out that there is no such thing as a rule, as to the legal measure of damages, applicable to all cases.’”

The quantum of damages being a question of fact for the trial judge the sole question that we have to determine in this appeal is not whether he followed any particular rules or the orthodox method in computing the damages claimed by the plaintiff, but whether the damages awarded are “such as may fairly and reasonably be considered as arising . . . according to the usual course of things, from the breach of the contract itself.” The plaintiff is not entitled to be compensated to such an extent as to place him in a better position than that in which he would have found himself had the contract been performed by the defendant.

In this case he failed to give precise information how his profits were to be calculated, and in my view the learned trial judge was justified to make “a guess in the dark and award him some arbitrary sum.” Notwithstanding the forceful argument of counsel for the appellant I am not persuaded that the learned trial judge’s assessment has resulted in an injustice, for it is the substance and not the letter that should be regarded in these cases.

Dealing with the claim for loss of publicity the learned trial judge said:

“With regard to the claim for damages for loss of publicity, it is conceded that this is an unusual claim, but I accept counsel for the appellant’s submission that that is no ground for not considering it. On the other hand, I am not satisfied that there is evidence which would justify an award of damages under this head and if, in fact, any such loss occurred, it seems to me that the sum of approximately £750, being the difference between the amount legitimately expended and the amount of the deposit, should be sufficient to cover any such loss.”

With all due respect to the learned trial judge there is nothing unusual or novel about a claim for loss of publicity, and in this appeal counsel for the appellant cited in support of his argument a number of authorities including the case of *Marbe v. George Edwardes (Daly’s Theatre) Ltd.* (2), in which claims under that head were allowed where the contracts implied promises of widespread publicity. Counsel for the appellant submitted that by the breach the appellant in this case lost an opportunity to organise a safari for a wealthy and influential person from the U.S.A. He contended that had the safari taken place and proved successful it would have enhanced the appellant’s reputation in the safari business. He then invited the court to consider these two questions: (1) whether if the appellant had had the safari that would have given him publicity; and (2) whether the appellant was deprived of the opportunity of publicity by the breach.

Counsel for the appellant placed great reliance on a letter dated March 29, 1961 from a Mr. A. R. Stasche, who, it was contended, was an agent of the respondent. This letter which was addressed to the appellant contained the

background of the respondent and said amongst other things the following: “A recommendation from one of the Dupont’s goes a long way in the States.”

I have no doubt on the facts of this case that Mr. Stasche was the agent of the respondent, but I can see nothing in the letter of March 29, 1961 which is in the form of an obligation by the respondent to compensate the appellant for loss of an opportunity for publicity. Most of the authorities relied on by counsel for the appellant are cases of contract to engage actresses for theatrical performances and to advertise their appearance. In most of those cases the courts awarded damages both for the loss of existing reputation and loss of opportunity to enhance it. There is in these types of contract an implied obligation at any rate to afford an opportunity to the person engaged to display his or her ability before an audience. In my view there is no such obligation in an ordinary safari contract. In drawing the distinction between an ordinary contract of service and a contract for theatrical performance in *Turner v. Sawdon & Co.* (9), Stirling L.J. ([1901] 2 K.B. 653 at p. 659) referred to *Fechter v. Montgomery* (10), and then said:

“On the other hand in the case of an actor who accepts an engagement, it may be an important consideration with him to have an opportunity of displaying his abilities before the public and it may be there is an implied obligation on the part of the master to afford such opportunity . . .”

A plaintiff in an action for breach of contract is entitled to recover only such part of his loss resulting as was reasonably foreseeable by the parties at the time of the contract. But reasonable foreseeability depends upon the knowledge of the parties at the time: see *Victoria Laundry (Windsor) Ltd. v. Newman Industries Ltd.* (1), ([1949] 2 K.B. 528 at p. 539).

In this case there can be no doubt that Mr. Stasche had knowledge of what I may term the “publicity value” of the safari. This knowledge could be imputed to the respondent; but mere knowledge of a possible damage as a result of breach is not sufficient unless the defendant has agreed to bear it. As Willes J., pointed out in *British Columbia Saw-Mills Co. v. Nettleship* (11) ((1868), L.R. 3 C.P. 499 at p. 509):

“... the mere fact of knowledge cannot increase the liability. The knowledge must be brought home to the party sought to be charged, under such circumstances that he must know that the person he contracts with reasonably believes that he accepts the contract with the special condition attached to it.”

See also *Victoria Laundry (Windsor) Ltd. v. Newman Industries Ltd.* (1) ([1949] 2 K.B. at p. 538). In this case far from the respondent undertaking to bear any special loss resulting from lack of publicity it is plain that the appellant himself did not expect him to bear such a loss. The learned judge’s findings on this aspect of the claim are contained in the following passage of his judgment:

“The two European assistant white hunters were engaged by the plaintiff entirely on his own initiative and without reference to the defendant. The evidence and correspondence shows that the defendant expected the plaintiff to be the white hunter for the safari and never contemplated any other white hunters being employed. The plaintiffs’ own evidence on this point is as follows:

‘I was to bear entirely the cost of the two white hunters for the purpose of the publicity which I would have derived from the safari. Had I not engaged them my charges to Mr. Dupont would have been the very same.

The two hunters Engelbrecht and Wincza were engaged to help me so as to make the safari 100 per cent. successful entirely on my own account because of the publicity angle . . . As far as the client is concerned he thinks he is coming out with me.

I would have been prepared to have made as little as possible on this safari because of the publicity and that is why I engaged two white hunters. I didn't expect Mr. Dupont to pay them. That is entirely my own affair . . . I had engaged them for the publicity value. I called them as witnesses to prove I had spent so much money. The publicity value was why I engaged them. Having lost the publicity value I don't see why I should lose the money as well.'

There is other evidence which supports the view that the defendant was entitled to expect the plaintiff to be his personal white hunter, and that the employment by the plaintiff of two extra white hunters was entirely his own responsibility, and not a matter for which the defendant could be held liable."

The learned judge continues:

"In my view, the plaintiff is not entitled to claim as against the defendant the amount paid and agreed to be paid to the two assistant white hunters, either as damages arising naturally from the breach of contract, or as damages such as might reasonably be supposed to have been in the contemplation of both parties."

In my view the learned trial judge was right in disallowing the claim for damages for loss of publicity.

For the above reasons I would also dismiss this appeal with costs.

Appeal dismissed.

For the appellant:

Kean & Kean, Nairobi

Clive Salter, Q.C. and S. L. Chawla

For the respondent:

B. Georgiadis, Nairobi

Lalitmohan Mansukhlal Bhatt v Prataprai Luxmichand and another [1964] 1 EA 414 (CAA)

Division:	Court of Appeal at Aden
Date of judgment:	18 April 1964
Case Number:	70/1964
Before:	Crawshaw, Newbold and Crabbe JJA
Sourced by:	LawAfrica
Appeal from:	The Supreme Court of Aden, Le Gallais, C.J.

[1] *Rent restriction – Possession – Shop – Application by landlord – Tenant and brother carrying on business together – Partnership dissolved – Tenant in business elsewhere – Brother carrying on business at shop – Tenant storing goods in shop – No intention to carry on business there or to re-occupy shop – Whether tenant has “transferred possession” within the meaning of the Rent Restriction Ordinance (Cap. 136) s. 11 (A).*

[2] Stare decisis – Court of Appeal – Previous decision of court inconsistent with English decisions in pari materia – Court reconstituted since previous decision – Whether previous decision can be treated as per incuriam.

Editor's Summary

The appellant lived in the upper part of a building at Dana Bazaar which he owned and let the ground floor as a shop to the first respondent. During 1960 the first and second respondents, who were brothers carrying on business together in the shop, dissolved partnership and the second respondent started a business at the shop in which the first respondent had no interest; the first respondent carried on a separate business elsewhere. In 1961 the appellant gave

notice to the first respondent terminating the tenancy of the shop and claiming possession as he alleged that the first respondent had “sub-let” or “transferred” the shop to “Mehta Store” without consent. The first respondent refused to give possession and purported to continue in occupation as a statutory tenant under the provisions of the Rent Restriction Ordinance. In November 1961 the appellant filed a suit in the Supreme Court in which he claimed possession of the shop against the first respondent and an injunction against the second respondent restraining him from trespassing in the shop. The evidence at the trial was that after the second respondent had commenced the business of “Mehta Store,” the first respondent continued to use the shop for storing certain trade goods, that their value was Shs. 60,000/- in 1961 and at the time he gave evidence in 1963 Shs. 30,000/-, that he was not importing more stock, that some goods were stored in a “loft” in the shop and others were stored in the cupboards there, that the furniture in the shop was his although used by the second respondent and that he visited the shop “every two or four days . . . to ascertain the fate of the goods.” There was also evidence that there was a notice outside the door of the shop reading “Mehta Store,” and below it a brass plate affixed in 1947 and bearing the words “Importer & Exporter & Commission Agent, Aden” which business the first respondent had ceased to carry on there and that the first respondent always retained at least one key of the shop and both keys when the second respondent was away in India. In dismissing the suit the Chief Justice held that the facts did not constitute a parting with possession by the first respondent within the meaning of the Ordinance and, referring to s. 11(2)(g) *ibid.*, went on to hold that “legal possession of the suit premises has remained with” the first respondent “throughout and there is accordingly no breach of covenant on which he could be evicted.” The grounds of appeal from this decision were *inter alia* that the judge had erred in law in considering and applying principles relevant to legal possession and breach of covenant and should have had regard to cesser of occupation by the first respondent and his transfer of *de facto* possession to the second respondent and that the judge had failed to appreciate or to consider that, upon the facts admitted and proved as to the transfer of *de facto* possession of a major part of the shop, the first respondent had failed to discharge the burden of proving that he had not parted with possession so as to transfer possession of a part of the shop within the meaning of the Ordinance. It was also submitted that the learned Chief Justice had approached the matter as though the application for possession had been brought under s. 11 (2) *ibid.* for a breach of covenant not to transfer and that he wrongly assumed that the test was a transfer of legal possession and not merely actual possession.

Held – (Per Crawshaw and Crabbe, JJ.A., Newbold, J.A. dissenting):

- (i) there being no legal estate in a statutory tenant the word “transfer” in s. 11(2)(g) could only mean a parting with the actual or physical possession, for there was nothing more in the tenant for him to part with: *M. Kassapian v. Sir Mohamed Abdul Kader Mackawee* (8), not followed;
- (ii) taking into consideration the nature and purpose of the Ordinance the words “or transferred the possession of” (in s. 11(2)(g) *ibid.*) would include occupation under licence, whether with or without payment;
- (iii) the Chief Justice misdirected himself in thinking that there must be a parting with the legal possession and a breach of covenant before the provisions of s. 11(2)(g) *ibid.* applied; had he not so misdirected himself, he might well have found that the occupation amounted to a transfer of actual possession within the meaning of para. (g) *ibid.*;
- (iv) the circumstances were such as to throw the onus onto the first respondent to show that he had an intention to re-occupy, an onus which he made no effort to discharge;

- (v) not only was there a transfer of possession of a major part of the shop but the degree and nature of that transfer amounted to a cesser of possession by the first respondent;
- (vi) there was no evidence that the first respondent had left the furniture in the shop as a symbol of his intended re-occupation of it; there was no evidence that he ever did intend to re-occupy and the circumstantial evidence was all against such intention;
- (vii) the case of *M. Kassapian v. Sir Mohamed Abdul Kader Mackawee* (8) (supra) was wrongly decided without reference to relevant authorities and the court would treat that decision as per incuriam and as not binding.

Appeal allowed. Case remitted to Supreme Court of Aden for consideration whether it is reasonable to make an order for recovery of possession under sub-s. 11(1) *ibid.* and to order accordingly under sub-s. 3 *ibid.*

[**Editorial Note:** Newbold, J.A. in his dissenting judgment came to the conclusion that the decision in the Kassapian case (8) (supra) was not given per incuriam.]

Cases referred to in judgment:

- (1) *Chaplin v. Smith*, [1926] 1 K.B. 198.
- (2) *Stening v. Abrahams*, [1931] All E.R. Rep. 437; [1931] 1 Ch. 470.
- (3) *Jackson v. Simons*, [1922] All E.R. Rep. 583; [1923] 1 Ch. 373.
- (4) *Peebles v. Crosthwaite* (1897), 13 T.L.R. 198 C.A.
- (5) *Haskins v. Lewis*, [1930] All E.R. Rep. 227; (1930), 47 T.L.R. 195.
- (6) *Skinner v. Geary*, [1931] All E.R. Rep. 302; [1931] 2 K.B. 546.
- (7) *Carter v. S.U. Carburettor Co.*, [1942] 2 All E.R. 228; [1942] 2 K.B. 288
- (8) *M. Kassapian v. Sir Mohamed Abdul Kader Mackawee*, E.A.C.A. Civil Appeal No. 126 of 1952 (Aden) (unreported).
- (9) *Mashiter v. Smith* (1887), 3 T.L.R. 673.
- (10) *Brown v. Brash*, [1948] 1 All E.R. 922; [1948] 2 K.B. 247.
- (11) *Kiriri Cotton Co. Ltd. v. Ranchhoddas Keshavji Dewani* (1958), E.A. 239 (C.A.)
- (12) *Chettiar v. Mehatmee*, [1950] A.C. 581.
- (13) *Morelle Ltd. v. Wakeling*, [1955] 1 All E.R. 708.
- (14) *Riziki v. Sharifa* (1959), E.A. 1035 (C.A.)
- (15) *Robins v. National Trust Co. Ltd.*, [1927] All E.R. Rep. 73; [1927] A.C. 515.
- (16) *Caplan Ltd. v. Caplan* (No. 2), [1963] 2 All E.R. 930; [1963] 1 W.L.R. 1247.
- (17) *Cumming v. Danson*, [1942] 2 All E.R. 653; (1942), 112 L.J. K.B. 145.
- (18) *Reidy v. Walker*, [1933] All E.R. Rep. 182; [1933] 2 K.B. 266.

- (19) *Brown v. Bestwick*, [1951] 1 K.B. 21.
- (20) *Thompson v. Ward*, [1953] 1 All E.R. 1169; [1953] 2 Q.B. 153.
- (21) *Beck v. Scholz*, [1953] 1 All E.R. 814; [1953] 1 Q.B. 570.
- (22) *Robson v. Headland* (1948), 64 T.L.R. 596.
- (23) *Trimble v. Hill* (1880), 5 App. Cas. 342.
- (24) *Cooray v. R.*, [1953] A.C. 407.
- (25) *Hunt v. Tripp*, [1898] 1 Ch. 675.
- (26) *Brown v. Draper*, [1944] 1 All E.R. 246; [1944] K.B. 309.
- (27) *Mackawee v. M. Kassapian*, Aden Supreme Court Civil Suit No. 111 of 1954 (unreported).
- (28) *Oak Property Co. Ltd. v. Chapman*, [1947] 2 All E.R. 1; [1947] 1 K.B. 886.
- (29) *Baker v. Turner*, [1950] 1 All E.R. 834; [1950] A.C. 401.
- (30) *Young v. Bristol Aeroplane Co.*, [1944] 2 All E.R. 293.
- (31) *Royal Derby Porcelain Co. Ltd. v. Kagundad Russell*, [1949] 2 K.B. 417.
- (32) *West Ham Union v. Edmonton Union*, [1908] A.C.1.

- (33) *Perrin v. Morgan*, [1943] 1 All E.R. 187; [1943] A.C. 399.
- (34) *Overseas Tankship (U.K.) Ltd. v. Morts Dock & Engineering Co. Ltd.*, [1961] 1 All E.R. 404; [1961] A.C. 388.
- (35) *Re Polemis*, [1921] All E.R. Rep. 40; [1921] 3 K.B. 560.
- (36) *Doughty v. Turner Manufacturing Co. Ltd.* (1964), 2 W.L.R. 240.
- (37) *Keeves v. Dean*, [1924] 1 K.B. 685.
- (38) *Catterall v. Sweetman* (1845), 9 Jur. 951.
- (39) *Lovibond v. Vincent*, [1932] 1 K.B. 687.
- (40) *Salton v. Dorf*, [1929] 2 K.B. 304.
- (41) *Nadarajan Chettiar v. Walanwa Mahatma*, [1950] A.C. 481. (P.C.)

Judgment

The following judgments were read by direction of the court: **Crawshaw JA**: The appellant appeals against the dismissal of his suit in which he asked for possession of the suit premises against the first respondent, and for an injunction against the second respondent restraining him from committing trespass in the suit premises.

The facts not in dispute in this appeal are that the appellant is the owner of a building known as 56/42 Dana Bazaar in the Crater. He lives with his family in the upper part and let the ground floor as shop premises to the first respondent (which shop premises are hereinafter referred to as the “suit premises”). On September 11, 1961 the appellant gave notice to the first respondent terminating the tenancy as from September 30, and demanded immediate possession, for the reason, the appellant said, that he had recently come to know that the first respondent had “sub-let” or “transferred” the suit premises to “Mehta Store” without consent. Possession was refused, and the first respondent purported to continue in occupation as a statutory tenant under the provisions of the Rent Restriction Ordinance, Cap. 136 of the Laws of Aden (hereinafter referred to as “the Ordinance”). Prior to some date in 1960, the first and second respondents, who are brothers, carried on a joint business in the suit premises. During 1960, however, the partnership was dissolved and the second respondent started a business under the name of “Mehta Store” in the suit premises in which business the first respondent had no interest; the first respondent carried on a separate business elsewhere.

In November 1961 the appellant filed his suit. In his written statement of defence the first respondent claimed that he had not parted with possession of the suit premises and alleged that the second respondent was occupying only a part thereof by the leave and licence of the first respondent. The second respondent denied being in possession except as a licensee of a part of the suit premises.

The evidence was that after the second respondent commenced the business of “Mehta Store,” the first respondent continued to use the suit premises for storing certain cloth trade goods; it would seem that they may have been what was left over from the cloth goods trade which he originally carried on there, but the evidence is not very clear as to this. In 1961 he said their value was Shs. 60,000/- but that he had been selling them off (it is not suggested that he used the suit premises as a shop for that purpose in the ordinary sense of the word, but for the purpose of storage) and that at the time he gave evidence in

1963 the value had been reduced to Shs. 30,000/- and that he was not importing or dealing in fresh stock. He constructed in the suit premises what he described as a “loft” in which he stored some of the goods, and the others he kept in cupboards there. The furniture in the shop was his, although used by the second respondent. He said he visited the suit premises “every two or four days . . . to ascertain the fate of the goods.” As to the keys of the suit premises, the learned Chief Justice

found that he “retained at least one key always and both keys whilst defendant 2 was away in India for some months”. On the outside of the door was a notice “Mehta Store”, and below it a brass plate affixed in 1947 and bearing the name of the 1st respondent and the words “Importer and Exporter and Commission Agent, Aden,” which was not of course a business carried on by the 1st respondent in those premises at the relevant time.

The learned Chief Justice held that the facts did not constitute a parting with possession by the first respondent within the meaning of the Ordinance and referred to s. 11(2)(g) thereof. Under s. 11 the court may, if it considers it reasonable to do so, make an order for the recovery by the landlord of possession of any premises to which the Ordinance applies, and without proof of alternative accommodation, if:

“11 (2) (g) notwithstanding anything contained in the Transfer of Property Ordinance, the tenant has without the consent in writing of the landlord, assigned, sub-let or transferred the possession of the premises or any part thereof.”

As to the legal principles involved, the learned Chief Justice said as follows:

“To quote from Foa’s General Law of Landlord and Tenant (7th Edn.), p. 271: ‘Moreover, merely permitting other persons to use the premises for their own purposes is not, so long as the tenant retains the legal possession, himself, a breach of the covenant’.”

This position was approved in *Chaplin v. Smith* (1) ([1926] 1 K.B. at p. 210), and although it is a decision based on the English Acts I have no doubt that the same principle applies in Aden, as held by Campbell, J. as he then was, in Civil Suit No. 111 of 1954. The question is clearly one of degree as was made clear by Farwell, J. in *Stening v. Abrahams* (2) ([1931] 1 Ch. at pp. 473 and 474):

“The authorities on the whole show that nothing short of a complete exclusion of the grantor or licensor from the legal possession for all purposes amounts to a parting with possession. The fact that the agreement is in the form of a licence is immaterial as the licence may give the licensee so exclusive a right to the legal possession as to amount to a parting with possession.”

Admittedly the English authorities are based upon the proposition that only a parting with the whole of the suit premises can amount to a breach of covenant yet, nevertheless, I am satisfied that the same principles apply when considering the question of a part of the suit premises.”

The Chief Justice then went on to hold:

“that the legal possession of the suit premises has remained with defendant 1 throughout and there is accordingly no breach of covenant on which he could be evicted.”

I am not clear to what the Chief Justice referred when he said in relation to the *Chaplin* case (1), “it is a decision based on the English Acts”, for it was not a case which invoked the Rent Restriction Acts.

It seems to be common ground that the second respondent occupied part of the suit premises as licensee of the first respondent. There is no evidence that he was required to pay therefore, or that any conditions attached to the licence which was for no definite period. The English provision equivalent to para. (g) of s. 11(2) of the Aden Ordinance is s. 5(1)(h) of the Increase Rent and Mortgage Interest (Restrictions) Act 1920, as amended by the 1923 Act, but it relates specifically to assignments and sub-letting only and does not contain such words

as “or transfer the possession of” which occur in s. 11(2)(g). I use the word “specifically”, for the courts in England have held that a statutory tenant who parts with possession otherwise than by assignment or sub-letting, and even without consideration (e.g. to a licensee), loses the protection of the Acts. Further the English para. (h) relates only to premises which are wholly assigned or sub-let whereas the Aden paragraph applies to “any part” of the premises. The English Acts do not of course apply to business premises whereas the Aden Ordinance does.

Counsel for the appellant has submitted that the learned Chief Justice in the instant case has approached the matter from the wrong legal angle, as though the application for possession had been brought under s. 11(2)(g) for a breach of covenant not to transfer; that he was wrong in thinking the test was a transfer of legal possession and not merely actual possession; and that determination of the contractual tenancy automatically terminated any existing licence.

It is true that the cases cited by the learned Chief Justice, (*Chaplin v. Smith* (1) and *Stening v. Abrahams* (2)) (supra) were not under the Rent Restrictions Acts (and perhaps significantly, are not mentioned in Megarry on the Rent Acts) but were in respect of alleged breaches of covenant not to part with possession of demised premises or any part thereof. In the earlier case, Scrutton, L.J. expressly approved an extract from Foa on Landlord and Tenant (6th Ed.) similar to that quoted by the Chief Justice in the instant case. These cases, however, involve parting with legal possession and, as FOA points out, it is the parting with that which is the breach of covenant, and not the parting with mere physical possession. The first part of the headnote to the *Chaplin* case (1) correctly sums up the principle as expressed in that case and in the relevant cases referred to therein; it reads:

“A lessee who has covenanted not to part with possession of the demised premises does not commit a breach of the covenant by merely permitting another person to have the use of the premises, so long as the lessee retains the legal possession himself”.

In *Jackson v. Simons* (3) cited with approval in the *Chaplin* case (1), a defendant conferred upon the proprietor of a night club what Romer, J. described as “a mere privilege or licence to use a part of the demised premises” without the consent of the lessor, there being a covenant not to assign, underlet or part with them or any part thereof. Romer, J. said:

“The defendant moreover retained the legal possession of the whole of the premises at all material times and, as pointed out by Romer, J. in *Peebles v. Crosthwaite* (4), a lessee who retains such possession does not commit a breach of a covenant against parting with possession by allowing other people to use the premises”.

Counsel for the appellant rightly submits that a statutory tenant has no legal estate to part with or retain. In Megarry (9th Ed.) at p. 182 it is said with reference to authorities and dicta:

“It has been said ‘time and time again’ that ‘the statutory tenant has no estate or property as tenant at all, but has a purely personal right to retain possession of the property’. The tenancy has been called ‘nothing more than a status of irremovability’, or ‘a permanency of tenure’; and it has been said that the tenant, who has been described with some degree of vituperation is not a tenant at all in the sense that he has an estate. He has . . . a merely personal right of occupation.’ The convenient but inaccurate term ‘statutory tenancy’ is thus a misnomer; it is ‘a somewhat inapposite expression, for it confers on the so-called statutory tenant no estate or interest in the land,

and is merely 'a compendious expression to describe the right of a tenant of protected premises to remain in possession of those premises, notwithstanding the determination of his contractual interest'. Thus if he purports to sub-let, he confers no estate on the sub-tenant, for 'he cannot carve something out of nothing', though such sub-tenancies may themselves be protected by the Acts."

Megarry expresses the view that it was as a result of judicial decisions that in s. 49 (1) of the Housing Repairs and Rents Act, 1954, "statutory tenant" is defined as meaning "a tenant . . . who retains possession by virtue of the Rent Acts and not as being entitled to a tenancy."

Counsel for the appellant has referred us to *Haskins v. Lewis* (5) and *Skinner v. Geary* (6). In the former *Romer*, L.J. said (47 T.L.R. at p. 198):

"It has frequently been pointed out in the courts, and it has been pointed out once more by Scrutton, L.J. in the judgment that he has just given, that the principal object of the Acts was to protect a person residing in a dwelling-house, and to protect him from being deprived of his home and being turned out of his home. Where therefore, when the contractual tenancy comes to an end, it is found that the tenant is not in physical possession of any part of the premises, there is in the act nothing which enables him to resist the claim of his landlord to possession, whether he has gone out without sub-letting the premises or whether he has sub-let the premises as a whole."

In the *Skinner* case (6), the tenant vacated the suit premises to live elsewhere and allowed relations to live in them without, so far as was known, payment of rent, a kind of tenancy-at-will as Scrutton, L.J. described it. Scrutton, L.J. said ([1931] All E.R. Rep. at pp. 560, 561):

"Parliament was dealing with a tenant who was in occupation and who was not to be turned out; it was not dealing and never intended to deal with a tenant who was not in occupation but who wished to stay: 'Although I am not in actual occupation I claim the right so long as I pay the rent to retain my tenancy'."

A non-occupying tenant was in my opinion never within the precincts of the Acts, which were dealing only with an occupying tenant who had a right to stay in and not be turned out. This case is to be decided on the principle that the Acts do not apply to a person who is not personally occupying the house and who has no intention of returning to it."

In the same case, Slessor, L.J., ([1931] All E.R. Rep. 569) said:

"I therefore come to the conclusion that the restriction on the landlord's right to recover possession is confined to the case of persons who are tenants residing on the premises, meaning thereby not residing in the narrow sense, but tenants of whom it can properly be said that they are in actual occupation. I agree with Scrutton, L.J. that although a person may be absent from the premises for a time, yet if he has an intention to return to them, it may fairly be said that he is still in actual possession and therefore entitled to be protected."

In the case of *Carter v. S. U. Carburettor Co.* (7) Lord Green, M.R. said ([1942], 2 K.B. at p. 291):

"The phrase 'statutory tenancy' although convenient, must not be allowed to mislead. In truth and in fact, a tenant who takes the benefit of the Act

after his lease has come to an end is not a tenant at all in the sense that he has an estate. He has, as has been held, a merely personal right of occupation, and that being a merely personal right, the authorities to which I have referred decided that no person can claim the benefit of that part of the Act unless he is himself personally in occupation . . .”

It will be seen that there is a fundamental difference between what is a parting with possession in breach of a covenant in a lease, and what is parting with possession by a statutory tenant. As to the former, Scrutton, L.J. said in *Chaplin v. Smith* (1) at p. 210:

“ . . . The respondent here is claiming possession on a forfeiture. In these cases the court relaxes somewhat its usual upright attitude and leans away from the forfeiture. This explains many of the decisions . . .”

Under rent restriction law there is no such relaxation; mere physical possession can be sufficient.

The above cases on the Rent Restriction Acts relate to premises which are wholly assigned or sub-let, in accordance with English law, whereas the equivalent Adan law relates also, as I have said, to premises which are in part assigned, sub-let or transferred. The principles enunciated in the English cases can therefore be applied to a part only of the suit premises. There being no legal estate in a statutory tenant the word “transfer” in s. 11(2)(g) can only mean a parting with the actual or physical possession, for there is nothing more in the tenant for him to part with. I see no reason to give a narrow meaning to the words “or transferred the possession of”. Taking into consideration the nature and purpose of the Ordinance they would, in my opinion, include occupation under licence, whether with or without payment.

In *M. Kassapian v. Sir Mohamed Abdul Kader Mackawee* (8), this court had occasion to construe the words “the tenant has without the consent of the landlord assigned, sub-let or transferred the possession of the premises or any part thereof”. They were contained in what was then s. 10(2)(g) of Ordinance No. 12 of 1947 as amended by s. 3 of Ordinance No. 15 of 1950 and are the same as in the present s. 11(2)(g) except that in the latter the words “in writing” were added, but nothing turns on this. The facts in the Kassapian case were that the appellant for about three years prior to the suit had been a monthly tenant of certain premises comprising two rooms, one on the ground floor which he used as an office and the other on the first floor in which he slept. A short time before the filing of the suit, the tenant moved out of the upper room and, without the consent of the landlord, allowed the second defendant to live and sleep in it free of charge. Thereupon the landlord determined the tenancy and applied to the Supreme Court for possession and obtained an order accordingly, the judge saying “by allowing the second defendant to live exclusively in the upstairs room for a period of three months, to which period no date of termination is envisaged by either party”, the tenant had brought himself within the scope of s. 10(2)(g). On appeal by the tenant this court confirmed the view of the trial judge that to come within the term “transfer” it was not necessary that there should have been any consideration for such transfer. Worley, V.-P. (as he then was) with whose judgment the other judges concurred held also that “no particular formality or writing” is required for the grant of a licence or permission, which was probably the type of agreement contemplated by the legislature as coming within the scope of the expression “transfer the possession”. The court therefore held that the latter expression was synonymous with “part with possession”.

The learned Vice-President then went on to say however:

“There is more substance in Mr. Stacey’s submission that it must be shown that the tenant has parted with or transferred the legal possession of the premises. Where the expression ‘transfer the possession’ is used, as here, in conjunction with the expressions ‘assign or sublet’, it is in my opinion proper to infer that the legislature used all these terms in the sense that they would be used by lawyers in connection with conveyances or leases. A covenant not to assign or underlet or part with possession of the demised premises or any part thereof is a well-known covenant in leases and the authorities are clear that the covenant is not broken unless the tenant is wholly ousted from the legal possession by the agreement which he makes with his licensee.”

The learned Vice-President then referred to *Chaplin v. Smith* (1) and to Scrutton, L.J.’s approval of the extract from Foa, to which reference has already been made. As to that extract, the Vice-President said, “In my view that passage sets out the principle which should be applied to the construction of para. (g) of s. 10 (1) of the Aden “Ordinance.” In disagreeing with the final conclusions of the trial judge the Vice-President said:

“... the questions for this court are whether the learned judge correctly directed himself on the construction of the expression ‘transfer the possession’ and, if he did, whether there was evidence to support a finding that the appellant had parted with the legal possession of the room which the second defendant was occupying. In my opinion both these questions must be answered in the negative. It does not appear from the record that the learned judge had the benefit of any legal argument on the meaning of para (g), and I am left in some doubt as to what meaning he wished to convey by his use of the word ‘exclusively’ when he says that the appellant allowed the second defendant to ‘live exclusively in the upstairs room’. It was not in dispute that the clerk Aziz had lived and slept there alone for that period but there was no evidence to support a finding that the arrangement between him and the appellant gave him any right to exclude the appellant from the room or barred the appellant from concurrently using the room at any time if he wished to do so. Had there been evidence that the second defendant had the key to the upper room, such an inference might have been justified. The strongest point in the respondent’s favour was that the appellant had himself moved out of the room and gone to live somewhere else, but as he retained legal possession of the ground floor room, his conduct is equally consistent with his retaining legal possession of the upper room. This was no doubt a border-line case and had the evidence been less vague and inaccurate, the upshot might well have been different. But on the evidence as it appears on the record, I am of opinion that the respondent failed to prove his case. I would therefore allow the appeal and set aside the order for possession”.

It would not appear from the record that any authorities on the Rent Acts were drawn to the attention of the Appellate Court in the *Kassapian* case (8). Had its attention been drawn to the relevant authorities I do not think that the court could have relied, as it did, on the extract from Foa and *Chaplin v. Smith* (1), nor on the necessity of a transfer of “legal possession”. In the circumstances, we are, in my opinion, clearly entitled to treat its decision as per incuriam and as not binding on us.

The crucial question, as I see it, is whether it can be said that the tenant transferred actual possession of a part of the suit premises to the first respondent. It is a question of fact dependent on the circumstances of the particular case, although it is a question of law whether those facts bring the possession within para. (g). The learned judge said – “Defendant 1 continued to use part of the

suit premises . . .” and “I find as a fact that defendant 1 granted a licence to defendant 2 during the time of his contractual tenancy to occupy part of the suit premises and carry on a business there”. The learned judge then went on to give his reasons for holding that this occupation by the second respondent did not amount to a parting with the “legal possession” by the first respondent and was not therefore a “breach of covenant on which he could be evicted”. For the reasons I have given the learned Chief Justice, in my opinion, misdirected himself in thinking that there must be a parting with the legal possession and a breach of covenant before the provisions of s. 11(2)(g) applied. Had he not so misdirected himself, he might well have found that the occupation amounted to a transfer of actual possession within the meaning of para. (g).

In *Mashiter v. Smith* (9), where there was a covenant not to demise any portion of the premises, the court held that to constitute a breach there must be a substantial parting with a substantial portion of the demised premises. That may be an apt generalisation to apply to a transfer under s. 11(2)(g). There can be no doubt that a substantial portion of the suit premises was occupied by the second respondent. The evidence also points to there having been a substantial parting. The learned Chief Justice did not consider this, but normally a person does not open a retail shop on a purely temporary basis, and the evidence of the first respondent (the second respondent did not give evidence) does not suggest that he had any intention of re-occupying the portion occupied by the second respondent. To my mind the only right conclusion therefore is that the first respondent permanently, or at least indefinitely, abandoned that part to the second respondent. The circumstances were, in my opinion, such as to throw the onus onto the first respondent to show that he had an intention to re-occupy, an onus which he made no effort to discharge. Counsel for the respondents, however, submits that the first respondent in fact remained in joint occupation with the second respondent and retained possession of a key and control of the whole premises. The learned Chief Justice concluded that the retention of a key, the furniture in the shop, and goods stored in the suit premises indicated that the first respondent did not part with legal possession, but failed to consider what effect these circumstances might have on actual possession.

It seems to me that in considering what is a transfer of actual possession for the purposes of para. (g) one has to bear in mind the purpose of the Ordinance and take a realistic and commonsense view of the facts, and divorce from one’s mind any question of legal possession. As I see it, the true position in the instant case is that the first respondent transferred the whole of the suit premises retaining for himself only the use of some cupboards built into the walls of the premises, and the so-called loft above the floor of the shop. Whether the loft, which was constructed by the first respondent himself, was a fixture is not in evidence, but it would seem from the evidence of the first respondent that it did not in any way interfere with the use by the second respondent of the whole of the floor space. The retention by the first respondent of a key to the suit premises does not, to my mind, affect the factual transfer of the floor space to the second respondent, although it might have been a factor to take into consideration had a transfer of a legal estate in the premises been in issue. Nor do I think that the use of the floor space of the shop by the first respondent to enable him to get to and from the cupboards and the loft affect the reality of his having substantially parted with the possession of the suit premises. If premises are legally sub-let, the retention of an easement to pass through them does not nullify the lease. The position as I see it here is somewhat analogous, in that possession of the suit premises had been factually given to the second respondent although the first respondent passed through them to obtain access to the loft and cupboards.

In *Rent and Mortgage Interest Restrictions* by the Editors of “Law Notes”, (22nd Edn.) at p. 152, it is said:

“A tenant who ceases to occupy the premises forfeits his rights under the Acts unless he can prove (1) a de facto intention on his part to return, and an outward and visible sign of that intention (2) continued occupation by some person installed by him with the status of a licensee and with the function of preserving the premises for his own ultimate homecoming or apparently, by furniture left on the premises as deliberate symbols of continued occupation. Proof of intention alone without proof of (2) is not sufficient.”

In Megarry (9th Edn.) it is said at p. 174:

“In the leading case of *Brown v. Brash* (10) it was established that even where there is an absence of the tenant sufficiently prolonged or unintermittent to compel the prima facie inference of a cesser of possession or occupation (which is a question of fact and degree), this is not conclusive but puts the onus on the tenant to show that his statutory tenancy nevertheless continues. To do this, he must show not only an animus revertendi to the house as a home but also a corpus possessions, the existence of both of which is a question of fact. A mere hope or chance of returning, as opposed to a firm intention, would probably not be a sufficient animus revertendi . . .”

As I have indicated, it is my opinion that not only was there a transfer of possession of a major part of the suit premises, but that the degree and nature of that transfer amounted to a cesser of possession by the first respondent. The latter has shown no intention to re-occupy, unless it can be said that the furniture he left in the shop is a symbol of continued occupation. The furniture was said to consist of a counter, a desk and “chairs”; how many chairs is not in evidence. In Megarry (8th Edn.) at p. 191 it is said:

“the question is whether the persons or objects in the dwelling-house are there in order to preserve it as a home for the tenant.”

In *Brown v. Brash* (10) ([1948] 2 K.B. at p. 255) the court, after saying that a caretaker might preserve premises for a tenant’s homecoming, said:

“... It may be that the same result can be secured by leaving on the premises as a deliberate symbol of continued occupation, furniture; though we are not clear that this was necessary to the decision in *Brown v. Draper* (26). Apart from authority in principle, possession in fact (for it is with possession in fact and not with possession in law, that we are here concerned) requires not merely an ‘animus possidendi’ but a ‘corpus possessionis’, namely, some visible state of affairs in which the animus possidendi finds expression.”

In that case the defendant, on being sent to prison, left in the house his mistress and furniture. The court said ([1944] 1 All E.R. at p. 255):

“... As regards the three items of domestic furniture which on the evidence Miss Mould left behind apart from questions of de minimis) there is no evidence that either the plaintiff or Miss Mould, or indeed anyone, intended there to remain on the premises as symbols of continued possession by the plaintiff.”

I can find no evidence that the first respondent left the furniture in the shop as a symbol of his intended reoccupation of it; there is no evidence that he ever did intend to re-occupy and the circumstantial evidence is all against such intention. In such circumstances the fact that the first respondent allowed his

brother to use a few articles of furniture falls far short of a deliberate symbol of continued occupation.

For the reasons I have given I would allow the appeal by setting aside the decree of the lower court dismissing the suit with costs. I would remit the suit to the court on the basis that the court has power to make an order for recovery of possession under s. 11(1)(a) read with sub-s. (2)(g). The trial court must now decide under s. 11(1) whether it is reasonable to make such order and if it finds that it is, what further order relating to the second respondent the law and circumstances may require and whether relief should be granted under sub-s. (3). I would order that the respondents pay the costs of this appeal and that the costs in the Supreme Court up to date and on remission be in the discretion of the Supreme Court.

Newbold JA: This appeal hinges upon the question whether the phrase “transferred the possession” in s. 11(2)(g) of the Rent Restrictions Ordinance (Cap. 136) means transferred the legal possession. If it does then the appeal fails as the appellant concedes that the legal possession was not transferred. Counsel for the respondent, during his address referred to a decision of this court in *Kassapian v. Mackawee* (8). This decision was to the effect that that phrase in that section meant legal possession. Counsel for the appellant, in his reply did not seek either to distinguish it or to urge that it was not binding on this court but merely asked that his submissions should be considered if it was open to this court to do so.

In *Kiriri Cotton Company Ltd., v. Rachhoddas Keshavji Dewani* (11), O’Conner, P., in a judgment with which the other members of the court agreed, clearly stated that this court is, in civil appeals, bound to follow a previous decision unless either (a) there are conflicting previous decisions of this court; or (b), the previous decision is inconsistent with a decision of another court binding on this court; or (c), the previous decision was given per incuriam. He then considered what decisions of other courts are binding on this court and came to the conclusion that decisions of the Privy Council and the House of Lords are so binding and that, probably decisions of the Court of Appeal of England (and other courts of a similar status) on a colonial statute which is like enactment to an English Act and established decisions of certain other English courts are also binding subject to the provisions of the relevant Order in Council applying English law and equity. (See also *Chettiar v. Mehatmee* (12), ([1950] A.C. at p. 492) when reference was made to the duty of a colonial court to follow the decision of the English Court of Appeal on the construction of words identical with those used in the colonial statute.) He then quoted with approval from a judgment of Evershed, M.R. in *Morelle Ltd. v. Wakeling* (13), ([1955] 1 All E.R. at p. 718) as follows:

“As a general rule the only cases in which decisions should be held to have been given per incuriam are those of decisions given in ignorance or forgetfulness or some inconsistent statutory provision or of some authority binding on the court concerned: so that in such cases some part of the decision or some step in the reasoning on which it is based is found, on that account, to be demonstrably wrong. This definition is not necessarily exhaustive, but cases not strictly within it which can properly be held to have been decided per incuriam must, in our judgment, consistently with the stare decisis rule which is an essential feature of our law, be, in the language of Lord Greene, M.R. of the rarest occurrence.”

The decision of the court in the *Kiriri* case (11) came before the Privy Council which stated that it was in full agreement with it.

Whether a decision is given per incuriam was again considered by this court in *Riziki v. Sharifa* (14), where the principle of stare decisis was again endorsed and the words of Evershed, M.R. again quoted with approval.

It should be borne in mind that when those decisions were given this court was Her Majesty's Court of Appeal established by an Order in Council for hearing appeals from territories which all had, for this purpose, the status of colonies and in respect of each territory there was an ultimate right of appeal to her Majesty in Her Privy Council. In those conditions the Privy Council itself stated in *Robins v. National Trust Co. Ltd.*, (15) ([1927] A.C. at p. 519):

“... when an appellate court in a colony which is regulated by English law differs from an appellate court in England, it is not right to assume that the colonial court is wrong. It is otherwise if the authority in England is the House of Lords.”

The position of this court is now vastly different. It is no longer Her Majesty's court, and it is established under an act of the East African Common Services Organisation primarily for three independent sovereign territories, two of which are Republics and in at least one of which it is the final court of appeal. I consider that the present position of this court in relation to the binding authority of the decisions of English courts is ripe for reconsideration but as the matter has not been argued I only mention the point.

Assuming that the old position applies, the more especially as this is an appeal from Aden with an ultimate right of appeal to the Privy Council, is it possible to regard the decision in the *Kassapian* case (8) as having been given per incuriam? In my view it clearly is not. There is no inconsistent statutory provision nor am I aware of any authority binding on this court to the contrary. It is not sufficient in a civil case to say that a previous decision is per incuriam merely because reference was not made to decisions not binding on the court or because the members of a later court would not have arrived at a similar decision. I regret that I differ from my brethren. The result, as I see it, is that this majority decision will itself be open to later challenge on the ground that it was given per incuriam, with a consequent chaotic state of uncertainty in the law.

For these reasons I would dismiss the appeal with costs without re-examination of the point in issue. I would, however, remark that I would find it difficult to say that a person has transferred the possession of premises if at all times he retains one, and at times, both, keys thereof; if he stores thousands of pounds of stock and some furniture thereon: if his business nameplate remains affixed thereon; and if he visits the premises every few days. (See for example, *Caplan Ltd. v. Caplan* (16)). If possession has not been transferred then obviously no question of an animus revertendi arises. Further, at present it seems to me that the reference to the transfer of possession of part of the premises in s. 11(2)(g) of the Rent Restrictions Ordinance is a reference to the transfer of exclusive possession of a specified part; and that a licence entitling the licensee to common possession of the whole with the licensor is not a transfer of possession of part of the premises within the meaning of that section.

Crabbe J: In my opinion this appeal should succeed, and but for the great importance of this case I should be content not to add a word to the judgment that has been given by Crawshaw, J.A. in which I concur.

The suit in this case was filed by the plaintiff against the defendants for the recovery of possession of a building known as No. 56/42, Dana Bazaar in Section “B”, Crater, in the Colony of Aden. The Rent Restrictions Ordinance (Cap. 136 Laws of Aden) applied to all premises situated within the Colony of

Aden at the material time.

At the trial it was common ground that the first defendant was a statutory tenant, and that by his leave and licence the second defendant had established his own business in part of the suit premises. The learned Chief Justice who heard the case found proved that the first defendant had at no time parted with possession within the meaning of the Rent Restrictions Ordinance. He accordingly dismissed the plaintiff's suit, and the whole basis of his decision is contained in the following passage of the judgment:

"In the instant case, when defendant 1 allowed defendant 2 in on licence, defendant 1 continued to use the suit premises himself as a go-down storing thousands of pounds worth of goods there. He kept his furniture in the suit premises, and moreover retained at least one key always and both keys whilst defendant 2 was away in India for some months. In these circumstances, I hold that the legal possession of the suit premises has remained with defendant 1 throughout and there has accordingly been no breach of covenant on which he can be evicted."

Against this decision the plaintiff has appealed to this court on the following grounds:

- "(1) The lower court erred in fact and in law in holding that defendant 1 had at no time parted with possession within the meaning of the (Aden) Rents Restriction Ordinance (Cap. 136).
- (2) The lower court erred in law in considering and applying principles relevant to legal possession and breach of covenant and should have had regard to the cesser of occupation by defendant 1 and his transfer of de facto possession to defendant 2.
- (3) The lower court erred in holding that defendant 1 could not be evicted in the absence of a breach of covenant on his part.
- (4) The lower court failed to appreciate or to consider that, upon the facts admitted and proved as to the transfer of de facto possession of a major part of the suit premises, defendant 1 failed to discharge the burden of proving that he had not parted with possession so as to transfer possession of a part of the suit premises within the meaning of Cap. 136.
- (5) The lower court erred in holding that defendant 2 was not a trespasser and could not be evicted on the ground that he had a right of occupation, derived through defendant 1, by way of licence; and this, notwithstanding that, upon the determination of his contractual tenancy, defendant 1 became a 'statutory tenant' having no greater right to enjoy, or to confer, immunity from eviction than is consistent with the protection afforded to statutory tenants."

The crucial question to be determined in this appeal is, I think, whether the two defendants could claim protection under the Rent Restrictions Ordinance of Aden. It seems to me that the Aden Ordinance is in pari materia with the English Rent Restriction Acts. The main objects of these English Acts have been expressed in various terms by the courts in England. Thus in *Brown v. Brash* (10) ([1948] 2 K.B. at p. 254) Asquith, L.J. said:

"... the clear policy of the Acts ... is to keep a roof over the tenant's or someone's head, not over an unoccupied shell, and to economise rather than sterilize housing accommodation."

In *Cumming v. Danson* (17) ([1942] 112 L.J.K.B. at p. 146) Lord Greene, M.R., also said that the English Acts are "Acts for the protection of tenants, and not Acts for penalizing of landlords."

Section 13 of Rent Restrictions Ordinance of Aden provides as follows:

- (1) Where by reason of the provisions of this Ordinance any tenant retains possession of premises to which this Ordinance applies such tenant shall so long as he retains possession, observe and be entitled to the benefit of all the terms and conditions of the original contract of tenancy, so far as the same are consistent with the provisions of this Ordinance, and shall, subject to any judgment or order as to possession or reversion of the premises only on giving such notice as would have been required under the original contract of tenancy, or if no such notice is provided therein, on giving reasonable notice.
- (2) Where the interest of a tenant of premises to which this Ordinance applies is determined, either as the result of an order or judgment or for any other reason, any sub-tenant to whom the premises or any part thereof have been lawfully sub-let shall, subject to the provisions of this Ordinance, be deemed to become the tenant of the landlord on the same terms as he would have held from the tenant if the tenancy had continued."

For the first defendant to rely on s. 13 he must show that he "retains possession" of the suit premises at the time of the suit.

It seems to me that the result of learned Chief Justices' judgment is that "possession" in this section includes "legal possession". With all due respect to the learned Chief Justice I think that he was wrong, for such an interpretation would not only defeat the main object of the Rent Restrictions Ordinance but would also be in conflict with a long line of authorities on rent legislation. In *Reidy v. Walker* (18) which was a case under s. 5 of the English Increase of Rent and Mortgages Interest (Restrictions) Act, 1920, as amended by s. 4 of the Rent and Mortgages Interest Restrictions Act, 1923, it was contended that possession and occupation in the Acts should be regarded as meaning no more and no less than what such words mean at common law. But this argument was unacceptable to Acton, J., who said ([1933] 2 K.B. at pp. 270, 271):

"It appears to me, however, that the Court of Appeal have in a series of cases taken a very different view, and that they have come to the conclusion that the protection afforded by s. 5 of the Act of 1920 has no application save to a tenant who is in occupation and possession in a certain limited sense. That limited sense is, I think, to be found expressed clearly in the recent decision of the Court of Appeal in *Skinner v. Geary* (6)."

Extracts from the judgments of Scrutton, L.J., and Slesser, L.J., in *Skinner v. Geary* (6) have been set out by Crawshaw, J.A., illustrating the fundamental principle that the rent restriction legislations protect only tenants in personal or actual occupation, and I do not wish to be unnecessarily tiresome in reproducing these passages in my own judgment.

In *Brown v. Brash* (10), a former tenant who has absented himself from the suit premises for a considerable period due to his incarceration claimed to be protected by the Rent Restriction Acts on the particular facts of that case. In delivering the judgment of the Court of Appeal Asquith, L.J., made the following observations ([1948] 2 K.B., at p. 255):

"Apart from authority, in principle, possession in fact (for it is with possession in fact and not with possession in law that we are here concerned) requires not merely an 'animus possidendi' but a 'corpus possessionis', namely some visible state of affairs in which the animus possidendi finds expression."

In *Brown v. Bestwick* (19) it was held that a tenant who was not continuously in residential occupation of the premises was not entitled to rely on the protection

of sec. 15 (1) of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920. That section is identical in terms to s. 13 (1) of the Rent Restrictions Ordinance (Cap. 136 Laws of Aden). In the course of his judgment Cohen, L.J., said ([1951] 1 K.B., at p. 26):

“Section 15 (1) provides that: ‘A tenant who by virtue of the provisions of this Act retains possession of any dwelling-house to which this Act applies shall, so long as he retains possession, observe and be entitled to the benefit of all the terms and conditions of the original contract of tenancy,’ and so on. It seems to me an essential ingredient that the tenant should retain possession continuously of the dwelling-house. In saying that I am not, of course, ignoring that in some case he might retain possession although he was not in personal occupation: for instance, if he were a sailor at sea, he might retain it by the presence of his wife and in furniture on the premises or, again, he would retain it if he ceased to occupy the premises temporarily owing to ill-health, . . . Apart from such exceptional cases, where the intention to return is fully established, it seems to me that the tenant is not entitled to rely on the protection of s. 15 (1) unless he is continuously in residential occupation of the premises.”

In *Thompson v. Ward* (20) the question that arose for the determination of the English Court of Appeal was whether the effect of s. 15 of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920 was that there still persisted in a former statutory tenant who was no longer in possession such a right in respect of those premises as would support an action for trespass. The court answered the question in the negative, and in his judgment Evershed, M.R. made these observations on the words “retain possession” in s. 15 (1) of the Act ([1953] 2 Q.B. at p. 161, 162):

“I deem it unnecessary, and indeed, unwise, in these proceedings to involve myself in any attempted exposition of matters which are not only difficult but which, I think, are not material to the present decision. If the tenant ‘retains possession’ within the meaning of the section then, and then only, he is entitled to be called a statutory tenant, and then, and then only according to the section, he is bound by, and enjoys, the benefit of the terms and conditions of the original contract of tenancy so far as they are applicable. But the question is, does he now retain possession?

If the plaintiff seeks to rely on s. 15, he must at least show that he retains possession. I have already given reasons for thinking that in this action he has not succeeded in establishing that he does retain ‘possession’, that is, possession of a nature and character sufficient to support his action. To decide the contrary would conflict with the Court of Appeal’s decision in *Brown v. Brash* (10) or, at best, to create undesirable refinements to the propositions which Asquith, L.J. there enunciated.”

On all the authorities I am satisfied that the learned Chief Justice erred in dismissing the plaintiffs suit by basing his judgment on the ground that the first defendant was in “legal possession” of the suit premises. There were, however, certain factors which influenced the learned Chief Justice in arriving at that conclusion. These were: (1) first defendant allowed the second defendant on licence to occupy the suit premises; (2) first defendant continued to use the premises as a go-down, storing thousands of pounds worth of goods there; (3) he left his furniture in the suit premises; and (4) he retained at least one key always and both keys whilst the second defendant was away in India for some months.

None of these matters I have referred to was dealt with in any detail in the judgment of the Chief Justice, and therefore, having regard to the fact that this

appeal is a rehearing, I propose to consider them briefly in the light of the decided cases on rent restrictions legislation, in order to determine whether the contention that the defendants are protected under the Rent Restriction Ordinance is any way tenable.

The learned Chief Justice must obviously have regarded the first defendant as a non-occupying tenant, that is to say, he was not in physical possession of any part of the suit premises. Taking factors (1) and (3) I think the test to apply to the facts is that stated in *Brown v. Brash* (10) (*supra*) by Asquith, L.J. as follows ([1948] 2 K.B. at pp. 254, 255):

“We are of opinion that a ‘non-occupying’ tenant *prima facie* forfeits his status as a statutory tenant. But what is meant by ‘non-occupying’? The term clearly cannot cover every tenant who, for however short a time, or however necessary a purpose, or with whatever intention as regards returning, absents himself from the demised premises. To retain possession or occupation for the purpose of retaining protection the tenant cannot be compelled to spend twenty-four hours in all weathers under his own roof for three hundred and sixty-five days in the year. Clearly, for instance the tenant of a London house who spends his week-ends in the country or his long vacation in Scotland does not necessarily cease to be in occupation. Nevertheless, absence may be sufficiently prolonged or unintermittent to compel the inference, *prima facie*, of a cesser of possession or occupation. The question is one of fact and of degree. Assume an absence sufficiently prolonged to have this effect: The legal result seems to us to be as follows: (1) The onus is then on the tenant to repel the presumption that his possession has ceased. (2) In order to repel it he must at all events establish a *de facto* intention on his part to return after his absence. (3) But we are of opinion that neither in principle nor on the authorities can this be enough. To suppose that he can absent himself for five or ten years or more and retain possession and his protected status simply by proving an inward intention to return after so protected an absence would be to frustrate the spirit and policy of the Acts, as affirmed in *Keeves v. Dean* (37) and *Skinner v. Geary* (6). (4) Notwithstanding an absence so protracted the authorities suggest that its effect may be averted if he couples and clothes his inward intention with some formal, outward, and visible sign of it; that is, installs in the premises some caretaker or representative, be it a relative or not, with the status of a licensee and with the function of preserving the premises for his own ultimate home-coming. There will then, at all events, be someone to profit by the housing accommodation involved, which will not stand empty. It may be that the same result can be secured by leaving on the premises, as a deliberate symbol of continued occupation furniture; though we are not clear that this was necessary to the decision in *Brown v. Draper* (26). Apart from authority, in principle, possession in fact (for it is with possession in fact and not with possession in law that we are here concerned) requires not merely an ‘*animus possidendi*’ but a ‘*corpus possessionis*’, namely, some visible state of affairs in which the *animus possidendi* finds expression. (5) If the caretaker (to use that term for short) leaves or the furniture is removed from the premises, otherwise than quite temporarily, we are of the opinion that the protection, artificially prolonged by their presence, ceases, whether the tenant wills or desires such removal or not.”

There can be little doubt on the facts of this case that the second defendant who was occupying the suit premises by leave and licence of the first defendant carried on his own business there, but there is no evidence that he also performed the function of preserving the premises for the ultimate return of the first defendant.

I will now deal with the evidence about the furniture. The second witness for the defendants testified as follows:

“XXD. The furniture in the S.P. consists of a counter, cupboards, desk and chairs. Def. 2 has been using the furniture for the purposes of his business of Mehta Stores.

REX. The furniture in question is not being used for Def. 1’s business except cupboards and shelves.”

In his evidence on commission the first defendant himself said:

“Defendant was using my furniture for his Mehta Store.”

In my view it is impossible to hold on the first defendant’s own showing that his (first defendant’s) furniture on the suit premises were left there “as a deliberate symbol of continued occupation.”

In his plaint the plaintiff alleged on the written statement that the first defendant was carrying on business as a Grain Merchant in Street No. 2, Section A, Crater. This allegation was admitted, and it would appear that the first defendant started this new venture, after his cloth partnership business with the second defendant in the suit premises had been dissolved. On the first defendant’s evidence it is reasonable to assume that he was running two shops at the same time. There is nothing in the Rent Restrictions Ordinance (Cap. 136, Laws of Aden) which prevents a tenant from relying on its protection in respect of more than one home. But the suit premises must be substantially used in this case as a shop, and not merely as a convenience or as a resort. It seems to me that the facts in this case raise the difficult problem of what is sometimes called the doctrine of the “two houses” man, and by analogy I think that the true test on this aspect of the case is whether the premises of which possession is sought are in the personal occupation of the tenant as one of his two shops. This is a question of fact, and the onus is on the tenant claiming protection under the Ordinance to show both an animus possidendi as a shop and a corpus possessionis. In *Beck v. Scholz* (21) Evershed, M.R. said ([1953], 1 Q.B. at p. 575):

“... I cannot see that it would be in accordance with the main principle and purpose of the rent restriction legislation to hold that a man may have statutory protection for any premises to which he may occasionally find it convenient to resort, and in which he may keep furniture and instal a caretaker, when in no true sense of the term are those premises his ‘home’, for example, where they are merely used as a matter of convenience for occasional visits. After all, the purpose of the Acts, as Scrutton, L.J., forcibly pointed out many years ago, is to protect occupying tenants against the hardship occasioned by the shortage of houses.”

The first defendant rented the suit premises in 1937 for a cloth business which he started alone. Later, according to the first defendant, the second defendant joined him as a partner. In 1960 this partnership was dissolved, but the second defendant carried on alone his own cloth business in a portion of the premises, and he used the first defendant’s furniture for his own business. The first defendant maintained, however, that he was carrying on business in part of the suit premises at the date of the suit, and part of his evidence as to state of his business is as follows:

“I am visiting the suit premises every two or four days. Since I started conducting the grain business. This was to ascertain the fate of my goods. There was my stock valued at Shs. 60,000/- in 1961 in suit premises. At present my stock in the suit premises would be about Shs. 30,000/-. I am not

dealing in cloth at present. I am not importing fresh stocks. I do not deal now in readymades, that is, not importing.”

As I have said earlier in this judgment the question whether the first defendant who owned two shops was in occupation of the suit premises in the real sense was one of fact for the trial court, but this court is not debarred from making its own inference from the facts proved. On the facts of this case I am unable to resist the conclusion that the first defendant did not really use that portion of the suit premises for any business, but for his own convenience of storing uncleared stock.

Applying either of the two tests which I have stated I do not think that mere possession by the first defendant of the keys of the suit premises was sufficient to bring him within the protection of the Ordinance.

But be that as it may the learned Chief Justice held that the first defendant had remained in “legal possession” of the entire suit premises up to the hearing of the suit. He had earlier in his judgment held “that defendant has at no time parted with possession within the meaning of the Ordinance”.

With respect, I think the learned Chief Justice’s interpretation of “possession” within the Rent Restrictions Ordinance (Cap. 136, Laws of Aden) is a conflict with the interpretation of that word by the English courts in cases under rent legislations in *pari materia*.

In *Robson v. Headland* (22) ((1948) 64 T.L.R. at p. 597) Tuckey, L.J. said:

“There is nothing in the actual language of the Rent Restriction Acts, read literally, to deprive a tenant in legal possession of premises of the protection of those Acts by reason of non-residence, but there is a long line of decisions of this court to that effect, and the one most often referred to *Skinner v. Geary* (6).”

In my view the learned Chief Justice was bound in principle to adopt the same construction in the interpretation of Aden rent restriction laws as the English courts have done unless local conditions militate against adopting such construction. In *Craies on Statute Law*, (6th Edn.) p. 139 it is stated thus:

“This rule also holds good with regard to a dominion or colonial Act in *pari materia* with an English Act. In *Catterall v. Sweetman* (38), Dr. Lushington said:

‘I must construe the Act of New South Wales . . . as an Act in *pari materia* . . . And I conceive (though I know of no direct authority for the position) that an Act of Colonial legislature where the English law prevails must be governed by the same rules of construction as prevail in England, and that English authorities upon an Act in *pari materia* are authorities for the interpretation of the Colonial Act. I think it is true as a general principle.’

This decision was approved by the Judicial Committee in *Trimble v. Hill* (23).”

In other cases subsequent to *Trimble v. Hill* (23), the Privy Council had emphasized the principle that the colonial or commonwealth countries should follow the decisions of the English Court of Appeal on the construction of words used in legislation in *pari materia* with legislation in the particular territory or country. Thus in *Chettiar v. Mahatmee* (12) Sir John Beaumont, delivering the judgment of the Judicial Committee of the Privy Council, observed as follows ([1950], A.C. 581 at p. 492):

“Mr. Wilberforce was on safer ground when he contended that it was the duty of courts in Ceylon to follow the decision of the English Court of Appeal

on the construction of words identical with those used in a Ceylon Ordinance. In *Trimble v. Hill* (23) the Board expressed this opinion: Their Lordships think the court in the colony might well have taken this decision (i.e. a decision of the English Court of Appeal) as an authoritative construction of the statute . . . Their Lordships think that in colonies where a like enactment has been passed by the legislature the colonial courts should also govern themselves by it.' This, in their Lordships' view, is a sound rule, though there may be in any particular case local conditions which make it inappropriate. It is not suggested that any such conditions exist in the present case, and the courts in Ceylon acted correctly in following the decision of the English Court of Appeal."

In *Cooray v. R.* (24) which is also an appeal from the Court of Appeal in Ceylon Lord Porter who delivered the reasons of the Privy Council said ([1953] A.C. at p. 419):

"In the case of an English Act the doctrine is well established that the interpretation put upon an earlier statute by the courts should as a rule be followed in a case where similar words are used in a later statute. So in the case of a colonial statute it has been held by this Board that in colonies where an enactment has been passed by the legislature in the same terms as an English statute, the colonial courts should adopt the construction put upon the words by the English Courts – see *Trimble v. Hill* (23). It is true that in that case the decision referred to was given by the Court of Appeal and that the courts which it was said should follow it were courts of a colony, but in their Lordships' view English courts should themselves conform to the same rule where there has been a long-established decision as to a particular section of an Act of Parliament, and even more so where there has been a series of decisions over a period of years. They accordingly are of opinion that in the case of the courts of a member of the British Commonwealth of Nations a similar course should be followed."

See also *Hunt v. Tripp* (25).

In my view the result of these observations by the Privy Council is that the learned Chief Justice was bound to follow the principle established by decisions of the English Court of Appeal that only a tenant in personal or actual possession is entitled to protection under the Rent Restrictions Ordinance (Cap. 136, Laws of Aden). A statutory tenant who relinquishes his possession of premises to which the Rent Restrictions Ordinance applies in circumstances which show that he has no real intention of returning to the premises within a reasonable time loses his protection under the Ordinance; his licensee is in no better position and in a suit for the recovery of possession by the landlord it is not necessary for him to make out a case under any of the grounds specified in s. 11 (2) of the Ordinance. As Lord Greene, M.R. pointed out in delivering the judgment in *Brown v. Draper* (26) ([1944] K.B. 309 at p. 313):

"There are, we think, only two ways by which a tenant whose contractual tenancy has come to an end can lose the protection of the Acts. One is . . . by giving up possession. The other is by an order against the tenant for recovery of possession."

In arriving at his conclusion on the facts the learned Chief Justice considered himself bound by the decision of the Supreme Court, Aden in the case of *Mackawee v. Kassapian* (27). This was a case in which the tenant had allowed a licensee to occupy part of the suit premises. The suit for recovery of possession was based solely on s. 10(1)(g) of the Rent Restrictions Ordinance, and the supreme court was therefore called upon to construe the words "transferred the possession of the premises". The supreme court held in effect that merely allowing

someone to occupy part of the premises exclusively to himself amounted to “transfer of possession” of part thereof within the meaning of the subsection. On appeal this court held:

“Where the expression ‘transfer the possession’ is used, as here, in conjunction with the expressions ‘assign or sublet’, it is in my opinion proper to infer that the legislature used all terms in the sense that they would be used by lawyers in connection with conveyances or leases. A covenant not to assign or underlet or part with possession of the demised premises or any part thereof is a well-known covenant in lease and the authorities are clear that the covenant is not broken unless the tenant is wholly ousted from the legal possession by the agreement which he makes with his licensee. In *Chaplin v. Smith* (1) ([1926] 1 K.B. (C.A.) at p. 211), Scrutton, L.J., cited with approval the following passage from Foa on Landlord and Tenant, (6th Edn.) p. 323:

‘The mere act of letting other persons into possession by the tenant, and permitting them to use the premises for their own purposes, is not, so long as he retains the legal possession himself, a breach of the covenant.’

In my view that passage sets out the principle which should be applied to the construction of para. (g) of s. 10 (1) of the Aden Ordinance.”

This case clearly decided that the words “transferred the possession” now in s. 11(2)(g) of the Rent Restriction Ordinance (Cap. 136, Laws of Aden) means the transfer of the “legal possession”. It also decided sub silentio that a statutory tenant who can claim to be in “legal possession” is protected by the Rent Restrictions Ordinance. But with all due respect a statutory tenant has no “legal possession” and therefore he has none to transfer. Yet in my opinion a statutory tenant can “sub-let or transfer the possession of the premises or part thereof”, and the sub-tenant may in certain circumstances claim protection under s. 13 (2) of the Rent Restriction Ordinance.

There can be no doubt that reading ss. 2 and 13 (1) of the Rent Restrictions Ordinance together the word “tenant” includes a “statutory tenant”. A statutory tenant has only a personal right to continue in possession; he has no estate and therefore cannot have a legal possession, but so long as he remains in personal occupation he can in my view part with possession within s. 11(2)(g), though the sub-tenant acquires only a right to continue possession. In *Oak Property Co. Ltd. v. Chapman* (28) Evershed, L.J. said: ([1947], 1 K.B. at p. 894):

“It must now be taken as well settled by decisions of this court that the nature of the right or interest of a statutory tenant is that of a personal right of possession on the terms partly of the original contract of tenancy and partly derived from the statutes. The words ‘tenant’, ‘sub-tenant’, ‘tenancy’, etc., are, therefore, used so as to comprehend such an interest involving no estate in the land recognized by the common law. The interest of the statutory tenant is not therefore capable of assignment, bequest or devolution to a trustee in bankruptcy: see, for example, the cases cited in argument of *Keeves v. Dean* (37), *Lovibond v. Vincent* (39), *Sutton v. Dorf* (40).

As a matter of principle and logic it would appear at first sight necessarily to follow that a sub-tenancy whether of the whole or of any part of the premises in question, granted by a statutory tenant must equally fail to confer upon the grantee any such estate in the property. It is, however, plain from the terms of s. 15 (3) of the Act of 1920, that persons to whom a statutory tenant has purported to grant a sub-tenancy may thereby acquire at least

a personal right to continue in possession, good against the landlord, after the statutory tenancy has come to an end.”

S. 15 (3) of the Act of 1920 is the same as s. 13 (2) of the Rent Restrictions Ordinance of Aden.

In *Baker v. Turner* (29), Lord MacDermott also made the following observations ([1950] A.C. 401 at pp. 436, 437)

“Secondly, ‘let’ is not limited to a letting under a contractual tenancy. It has long been settled that the Rent Acts do not prevent an owner from terminating the tenancy of his tenant in the ordinary way: what they do is to give to a person who has been tenant a right to remain in possession after the tenancy has gone. A person with such a right is commonly called a statutory tenant, but that name, though convenient, is inaccurate. The true position of such a person was stated as long ago as 1923 by Bankes L.J. in *Keeves v. Dean* (37) ([1924] 1 K.B. at p. 690): ‘... he is not a tenant at all; although he cannot be turned out of possession so long as he complies with the provisions of the statute, he has no estate or interest in the premises such as a tenant has’. It follows that, as a main purpose of the Rent Acts is to confer a statutory right to possess after the end of a contractual tenancy, the word ‘let’ must be interpreted in a sense wide enough to include subjects held or possessed by virtue of that right.”

It does not appear from the judgment of this court in the *Kassapian* case (8) that it considered any of numerous authorities of the Court of Appeal in England which have established that the Rent Restriction Acts protect only tenants in “actual or physical possession.”

In the *Kiriri* case (11) this court considered the principle of stare decisis in the Court of Appeal, and its exceptions as summarized by Lord Greene, M.R. in *Young v. Bristol Aeroplane Co.* (30), ([1944] 2 All E.R. 293 at p. 300). Sir Kenneth O’Connor, P., considering the second exception in the *Young* case (30) said ([1944] 2 All E.R. at p. 246):

“For instance, this court would be bound to refuse to follow a decision of its own, which, though not expressly overruled, cannot, in its opinion, stand with a decision of the Privy Council; or of the House of Lords *Robins v. National Trust Co. Ltd.* (15) or probably with a decision of the Court of Appeal in England on a colonial statute which is ‘a like enactment’ to an English Act (*Trimble v. Hill* (23) *Nadarajan Chettiar v. Walauwa Mahatma* (41), but see *Robins v. National Trust Co.* (15) ([1927] A.C. 515 at p. 519). I think also that decisions of any of the old appellate courts now treated as having similar authority to decisions of the Court of appeal would be on the same footing as regards statutes in pari materia.”

The learned President then referred to *Morelle Ltd. v. Wakeling* (13) in which a description given per incuriam was fully explained by Evershed, M.R. as follows ([1955] 1 All E.R. at p. 718):

“As a general rule the only cases in which decisions should be held to have been given per incuriam are those of decisions given in ignorance or forgetfulness of some inconsistent statutory provision or of some authority binding on the court concerned: so that in such cases some part of the decision or some step in the reasoning on which it is based is found, on that account, to be demonstrably wrong. This definition is not necessarily exhaustive, but cases not strictly within it which can properly be held to have been decided per incuriam must, in our judgment, consistently with the stare decisis rule which is an essential feature of our law, be, in the language of LORD GREENE, M.R. of the rarest occurrence.”

Having considered this principle the learned President came to the conclusion that this court was not bound by a previous decision given in ignorance or forgetfulness of authorities binding on the court.

The stare decisis rule, as qualified by the various exceptions in the *Young v. Bristol Aeroplane Company* (30) applies where appropriate to this court which is therefore bound to follow its own previous decisions. In elaborating on the exception in category (ii) in the *Young* case (30), Sir Kenneth O'Connor expressed the view that the *Kiriri* case (11) that this court would refuse to be bound by its own decisions though not expressly overruled which in its opinion is inconsistent with the decisions of the House of Lords or the English Court of Appeal on a colonial statute which is similar to an English Act. In my opinion this present case is a clear illustration, and I do not think we are bound to follow the *Kassapian* case (8).

Granted that there is no authority of any court binding on this court in view of the present constitutional development in the former East African Territories over which this court had jurisdiction it is quite clear that at the time when the decision in the *Kassapian* case (8) was given by this court, this court was Her Majesty's court and was bound by decisions of the English Court of Appeal. It seems therefore that the Court of Appeal decision in the *Kassapian* case (8) must have been given in forgetfulness or ignorance of the English Court of Appeal decisions on English Rent Acts which are in pari materia with the Rent Restrictions Ordinance of Aden.

But the "per incuriam" principle apart, it seems clear that the decision in the *Kassapian* case (8) was based on the dictum of Scrutton L.J. in *Chaplin v. Smith* (1) ([1926] 1 K.B. (C.A.) 198 at p. 211) which in the light of the English Court of Appeal decision, has no applicability to the Rent Restrictions Acts. *Chaplin v. Smith* (1) was not referred to in any of the several English cases on the Rent Acts which I consulted during my researches; neither is it referred to as an authority in any of the text-books on the Rent Acts which I am aware of. The construction of the words "transfer of possession" in s. 11(2)(g) of the Rent Restrictions Ordinance as meaning "transfer of legal possession" is obviously inconsistent with the accepted construction of "retain possession" in s. 13(1) of the same Ordinance.

There is no doubt in my mind that the *Kassapian* case (8) was wrongly decided. But the question which we have to determine is whether this court is bound to follow it. It is clear, I think, that a decision that is wrong in fact is not binding and could be overruled, unless the court that gave that decision has disabled itself to do so by itself expressly affirming it in a subsequent case. Thus in *The Royal Court Derby Porcelain Co. Ltd. v. Kagundad Russell* (31) Denning, L.J. (as he then was) said ([1949] 2 K.B. 417 at p. 429):

"The true view is that the court will be slow to overrule a previous decision on the interpretation of a statute when it has long been acted on, and it will be more than usually slow to do so when Parliament has, since the decision, re-enacted the statute in the same terms. But if a decision is, in fact shown to be erroneous, there is no rule of law which prevents it being overruled."

The decision in the *Kassapian* case (8) was given only in 1953, and it does not appear that it has since been consistently applied by this court. If therefore this court is satisfied that that decision was manifestly wrong there is nothing to prevent it from overruling it. As was pointed out by Lord Loreburn, L.C. in *West Ham Union v. Edmonton Union* (32) ([1908] A.C. 1 at pp. 4, 5:

"Great importance is to be attached to old authorities, on the strength of which many transactions may have been adjusted and rights determined. But where they are plainly wrong, and especially where the subsequent

course of judicial decisions has disclosed weakness in the reasoning on which they were based, and practical injustice in the consequences that must flow from them, I consider it is the duty of this House to overrule them, if it has not lost the right to do so by itself expressly affirming them.”

In *Perrin v. Morgan* (33) Viscount Simon, L.C. said ([1943] A.C. at p. 414):

“The present question is not, in my opinion, one in which this House is required, on the ground of public interest, to maintain a rule which has been constantly applied but which it is convinced is erroneous. It is far more important to promote the correct construction of future wills in this respect than to preserve consistency in misinterpretation.”

In the recent case of *Overseas Tankship (U.K.) Ltd. v. Morts Dock & Engineering Co. Ltd.* (The Wagon Mound) (34), the Privy Council did not allow itself to be persuaded by the Court of Appeal decision in *Re Polemis* (35), known to generations of students as a leading case in the law of damages, and relied on by several courts in the Commonwealth of Nations. In delivering the reasons of the Board Viscount Simonds said ([1961] A.C. at p. 422); “In their Lordships’ opinion it would no longer be regarded as good law.” It was so regarded by the Court of Appeal in England in the very recent case of *Doughty v. Turner Manufacturing Co. Ltd.* (36), when the court refused to follow its own decision in *Re Polemis* (35), Diplock, L.J. observed ((1964) 2 W.L.R. at pp. 248-249):

“Such a proposition might, before *Overseas Tankship (U.K. Ltd. v. Morts Dock and Engineering Co. Ltd., (The Wagon Mound)* (34), have been supported by in *Re Polemis, and Furness, Withy & Co. Ltd.* (35), but the decision of the Court of Appeal is no longer law.”

The *Kassapian* (8) case stands alone; it has no pride of ancestry, and for my part I will allow it no hope of posterity.

Accordingly I would allow this appeal and I agree entirely with the order proposed by Crawshaw, J.A.
Appeal allowed. Case remitted to Supreme Court of Aden for consideration whether it is reasonable to make an order for recovery possession under sub-s. 11 (1) ibid and to order accordingly under sub-s. 3 ibid.

For the appellant:

Horrocks, Williams & Beecheno, Aden
G. Horrocks

For the respondents:

P. K. Sanghani, Aden

The Diamond Jubilee Investment Trust Ltd v Jafferli Hassam Jadavji [1964] 1 EA 438 (HCT)

Division: High Court of Tanganyika at Dar-es-Salaam

Date of judgment: 3 April 1964

Case Number: 11/1964

Before: Spry J

[1] Practice – Mortgage suit – Interest – Contractual rate of interest – Mortgage providing for compound interest – Discretion of Court to order payment of interest in mortgage suits.

[2] Interest – Mortgage suit – Contractual rate of interest – Mortgage providing for compound interest – Discretion of court to order payment of interest in mortgage suits.

Editor's Summary

The plaintiff brought an action claiming an order for sale of property mortgaged to him. The mortgage deed provided for interest at 7 per cent. per annum, and a clause allowing the plaintiff, in the event of non-payment of interest, either to call in the entire debt or to capitalise the interest in arrear. The plaintiff claimed interest in the principal sum at the contractual rate until payment and interest at the same rate on all arrears of interest until payment.

Held –

- (i) section 34 of the Indian Code of Civil Procedure 1908 is not applicable to mortgage suits and the award of interest in such suits is in the discretion of the court;
- (ii) in mortgage suits the court should normally exercise its discretion to allow interest at the contractual rate up to the date fixed for payment, namely, the redemption date, and thereafter at the court rate.

Order accordingly.

No cases referred to in judgement.

Judgment

Spry J: On March 3, 1964, I heard evidence ex parte in proof of the claim in this suit but I reserved judgment as I felt some doubt as to the propriety of part of the prayer relating to interest. The plaintiff is claiming a sum which includes principal and interest up to December 31, 1963. In addition he claims interest on that sum at 7 per cent. per annum from January 1, 1964, until payment; interest at 7 per cent. per annum on all arrears of interest from January 1, 1964, until payment and interest at the court rate on the costs of the suit.

The suit was a suit for sale of mortgaged property. The mortgage provided for interest at 7 per cent. per annum, and contained a provision allowing the plaintiff, in the event of non-payment of interest, either to call in the entire debt or to capitalise the interest in arrears.

The first question is whether s. 34 of the Indian Code of Civil Procedure, 1908 as applied to Tanganyika (that section having been introduced by Ordinance No. 33 of 1956) relates to mortgage suits. The original section was held not to apply to mortgage suits because it was limited “Where and in so far as a decree is for the payment of money . . .”; there is no such limitation in the present section. Also, it may be noted that Order 34, which deals with mortgage suits, contains no provision regarding interest.

The difficulty in applying s. 34 is that it refers to judgments and judgment debts, whereas Order 34

refers to preliminary decrees and final decrees. At

first sight, it might seem that the preliminary decree should be regarded as the judgment, because it is normally then that the amount due is declared. I do not, however, think that is the correct view. The object of the preliminary decree is to give the mortgagor an opportunity to fulfil his obligations and so avoid the sale or foreclosure of his property. It would, in my opinion, be quite unreasonable to suppose that the legislature intended a mortgagor in default to recover his property on payment of anything less than the amount due under the mortgage and this means that the contractual rate of interest must continue at least until the date fixed for payment.

On the other hand, a final decree as provided in Order 34, r. 5, merely orders the sale of the mortgaged property and provides for the disposal of the proceeds of sale. It is difficult to see how such a decree could be regarded as a judgment, particularly having regard to the definition of “judgment” in s. 2 of the Code.

I think the answer must be to hold that s. 34 does not relate to mortgage suits and that the award of interest is in the discretion of the court. If that is so, I think that discretion should normally be exercised by allowing interest at the contractual rate up to the date fixed for payment and thereafter at the court rate.

I accordingly give judgment in favour of the plaintiff for Shs. 24, 291/20 and costs and direct that if the defendant so pay that amount, together with interest at 7 per cent. per annum and the costs of the suit, with interest thereon at the court rate, on or before May 30, 1964, he shall be entitled to redeem the mortgage but that in default the plaintiff shall be entitled to apply for a final decree. From and after May 30, 1964, interest will run until payment at the court rate. It is further ordered that Nurdin Alibhai Samji of Mtwara be constituted receiver, without security, his remuneration to be 5 per cent. of the gross income.

Order accordingly.

For the plaintiff:

I. R. Vellani, Dar-es-Salaam

Re Hoima Ginners Ltd (No. 2)
[1964] 1 EA 439 (HCU)

Division:	High Court of Uganda at Kampala
Date of judgment:	5 August 1964
Case Number:	3/1964
Before:	Slade J
Sourced by:	LawAfrica

[1] *Company – Winding-up – Creditor’s petition – Petition based on omission to comply with statutory notice – Alleged failure to pay damages for breach of contract – No proceedings taken by petitioners to*

establish breach on quantum of damages – Claim disputed by company on substantial grounds – Whether winding-up order should be made.

Editor's Summary

Creditors applied for winding-up of Hoima Ginners Ltd. on the ground that the company was unable to pay its debts, this inability being deemed to have been established by non-compliance with the terms of a statutory notice issued under s. 222 (e) and s. 223 (a) of the Companies Ordinance 1958. The sum claimed by virtue of the statutory notice was in respect of damages to which the petitioning creditors claimed they were entitled for breach of certain contracts by the company. It was common ground that there had been no proceedings in any court to determine whether there had been a breach of contract and what, if any, damages had been thereby suffered. At the hearing of the petition it was contended for the company that there had been no breach of any contract and that the petitioning creditors were not entitled to the damages which were claimed, and upon which the petition was founded.

Held – the debts upon which the petition was based were disputed by the company on substantial grounds; the petitioning creditors should first have established the breach of contract and quantum of damages by changing their claim into a judgment; in the circumstances they were not entitled to bring the petition for winding-up which would be dismissed.

Petition dismissed.

Cases referred to in judgment:

- (1) *Re Welsh Brick Industries Ltd.*, [1946] 2 All E.R. 197.
- (2) *Re Tanganyika Produce Agency Ltd.* (1957), E.A. 241 T.
- (3) *Re Tweeds Garages Ltd.*, [1962] 1 All E.R. 121.
- (4) *Re Douglas (Griggs) Engineering Ltd.*, [1962] 1 All E.R. 498.

Judgement

Slade J: This is a petition for the winding up by the Court of Hoima Ginners Limited (hereinafter referred to as “the Company”) presented by two companies, namely Leslie & Anderson (Coffee) Limited and Jamal Ramji & Company Limited (hereinafter referred to as “the petitioning creditors”).

Various procedural objections were taken by counsel for the company, but I think I can dispose of the matter without considering whether those objections are well founded.

The grounds on which the petitioning creditors proceed are that the company is unable to pay its debts, that inability being deemed to have been established by non-compliance with the terms of a statutory notice, – see s. 222 (e) Companies Ordinance 1958, read with s. 223 (a) of the Ordinance – and the petitioning creditors present the petition by virtue of the damages to which they claim to be entitled by virtue of the breach by the company of certain contracts into which it had entered with each of them respectively. It is contended for the company, if I understand the position correctly, that there has been no breach of contract and that the petitioning creditors are not entitled to the damages which are claimed and upon which the petition is founded.

It is common ground that no proceedings have been instituted in any court for the determination of the question whether there has been any breach of contract, and if so, what, if any, damage has been suffered by the petitioning creditors or either of them; nor has any question arising under any of the contracts in question been referred to arbitration.

It is well settled, and I think I need do no more than refer to Palmer’s Company Precedents, (17th Edn.) at pp. 27 and 28 and Buckley on Companies Acts, (13th Edn.) at p. 451 for a statement of the law, that the mere omission of a company to comply with a notice served on it under s. 223 (a) Companies Ordinance is not “neglect to pay” the sum claimed if there is reasonable cause for the omission, and the fact that the debt is bona fide disputed is reasonable cause for the omission.

Although counsel for the petitioning creditors, argued with considerable force that, while the amount of the debt may have been disputed, the dispute was not a bona fide one, I am not, on the affidavit before me, persuaded that his contentions are valid. It seems to me that those affidavits disclose reasonable grounds for dispute whether there were breaches of contract, and if there were, as to the amount of

damages, if any, which flow from such breaches; whether, in short, there is any debt at all.

There is, as I see it, no allegation of insolvency on the part of the company, other than is said to arise by non-compliance with the notice served on it under s. 223 of the Ordinance.

Counsel for the petitioning creditor submits that if I am satisfied that there is a bona fide dispute, there are three courses which, on the authorities, are open to me, these courses being as follows:

- (a) to dismiss the petition:
- (b) to stand over the petition pending the determination of other proceedings brought for the purpose of establishing the debt; or
- (c) myself, to determine the dispute.

He contends that I should adopt the third course, and in the course of these proceedings should, in effect, hear and determine a claim for damages on the part of the petitioning creditors for breach of contract.

In support of his submissions he cited the following authorities: *Re Welsh Brick Industries Ltd.* (1); *Re Tanganyika Produce Agency Ltd* (2); *Re Tweeds Garages Ltd.* (3) and *Re Douglas (Griggs) Engineering Ltd.* (4). With respect to counsel for the petitioning creditors to whose submissions I have listened with interest, I do not think that any of these authorities assists him in the instant case; the *Welsh Brick* case (1) was clearly one in which the petitioning creditor claimed recovery of certain liquidated sums of money by writ and before payment presented a petition for a winding up order founded on the amount of the claim. It was not a claim in respect of which a statutory demand had been made. The company obtained leave to appear and defend the claim. It was held that the mere fact that the company had obtained such leave did not necessarily mean that the debt was a disputed debt and that it was competent for the winding-up court to consider whether or not there was a bona fide dispute. The *Tanganyika Produce Agency* case (2) provides, in my judgment, not the slightest assistance to counsel for the petitioning creditors, although of course he was bound to refer to it as an authority relevant to the issues, and I am obliged to him for doing so. So far as the *Tweeds Garages* case (3) is concerned, the debt in that case arose from a running account and was capable of ascertainment at any particular time and there was no doubt that the petitioner was a creditor for a sum which would enable him to petition for an order; it was held that where there was no such doubt, a dispute as to the precise amount owing did not make the debt a disputed debt. There was therefore no dispute that the petitioning creditor was a creditor. The *Douglas (Griggs) Engineering* case (4) was one in which the petitioner was a judgment creditor and it was held that his right to petition for an order was not displaced by a disputed claim made by the company against the petitioner.

I am satisfied that, speaking in general terms, the courses suggested by counsel for the petitioning creditors are open to me. It is however clear that in each of the authorities cited, the petitioning creditor's debt was for a liquidated or ascertained sum. No authority has been cited to me for the proposition sought to be established by counsel for the petitioning creditors, namely that I should myself determine, not only whether there can be said to be a bona fide disputed debt, one which is in other words, disputed on substantial grounds, but also myself to try the issue whether the debt exists at all, for that purpose considering the terms of the contracts, determining whether there has been any breach of any of those contracts entitling the petitioning creditors to damages, and if so, the measure of those damages. So far as my researches have taken me, it would appear to me that a petitioning creditor seeking a winding up order founded on unliquidated damages should first establish with certainty what the quantum of damages is, and, to cite Buckley (13th Edn.) at p. 464, "must make himself a creditor by changing his claim into a judgment before he can petition". As he said in Buckley at p. 451, and it is a passage which was adopted in the *Welsh Brick* case (1).

“a winding up petition is not a legitimate means of seeking to enforce payment of a debt which is bona fide disputed by the company. A petition presented ostensibly for a winding up order but really to exercise pressure will be dismissed, and under circumstances may be stigmatized as a scandalous abuse of the process of the court.”

For the reasons I have endeavoured to state, I am of the opinion that the debts upon which the petition is based are disputed on substantial grounds. I decline in these proceedings to endeavour to settle the dispute. I have considered which of the two remaining courses to adopt, and conforming to what I believe to be the modern practice I am of the opinion that the more appropriate course is to dismiss the petition.

Accordingly the petition is dismissed with costs to the Company.

Petition dismissed.

For the petitioning creditor:

Hunter & Grieg, Kampala

A. I. James

For the company:

Parekhji & Co., Kampala

P. J. Wilkinson, Q.C., A. G. Mehta and B. D. Dholakia

Dharamshi Vallabhji & others v National and Grindlays Bank Limited [1964] 1 EA 442 (CAN)

Division:	Court of Appeal at Nairobi
Date of judgment:	2 September 1964
Case Number:	15/1964
Before:	Sir Trevor Gould VP, Newbold and Duffus JJA
Sourced by:	LawAfrica
Appeal from:	The Supreme Court of Kenya – Wicks, J.

[1] *Bank – Letter of hypothecation – Letter of hypothecation signed but not attested – Whether letter of hypothecation invalid inter partes – Chattels Transfer Ordinance (Cap. 28) s. 15 (K).*

[2] *Chattels transfer – Letter of hypothecation – Hypothecation of stock as security for overdraft – Letter of hypothecation invalid inter partes – Stock-in-trade seized by bank under power in letter of hypothecation – Consent in writing to seizure – Action for trespass – Consent to seizure not attested – Consent in writing no defence to trespass – Written consent an instrument within Chattels Transfer Ordinance (Cap. 28) (K).*

[3] *Statute – Construction – Legislation adopted from Commonwealth country – Decisions of*

Commonwealth country interpreting adopted legislation – Extent to which courts in Kenya bound by such interpretation – Chattels Transfer Ordinance (Cap. 28) (K).

Editor's Summary

In April 1960 the appellants opened a bank account with the respondent bank which undertook to provide the appellants with overdraft facilities repayable on demand and on conditions that the account was satisfactorily conducted. As security for these facilities the appellants gave the respondent, inter alia, a letter of hypothecation over their stock-in-trade and certain other articles specified in the letter which was signed by the appellants but was not attested or registered. In October 1960 two of the appellants showed to an official of the respondent bank a draft letter stating that the appellants were unable to pay their creditors, whereupon the respondent, without any formal notice, caused the stock-in-trade and other articles of the plaintiffs to be seized under the power contained in the letter of hypothecation. During the seizure two of the appellants voluntarily and with knowledge of its contents signed a letter

dated October 6, 1960 which referred to the letter of hypothecation and authorised the seizure. The appellants later sued the respondent for, inter alia, damages resulting from a trespass alleged to have been committed by the respondent in seizing the appellants' stock-in-trade, and the trial proceeded on the basis that the only issue initially was of liability. The judge held that the letter of hypothecation was an instrument within the Chattels Transfer Ordinance (Cap. 28) and since it was not attested it was invalid for all purposes inter partes and conferred no power on the respondent to seize the goods. The judge, however, dismissed the action on the ground that no trespass had been committed because there was an express agreement between the appellants and the respondent evidenced by the letter dated October 6, 1960, authorising the respondent to seize the goods as security for the overdraft. When the appellants appealed the respondent cross-appealed challenging the judge's decision that for want of attestation, the letter of hypothecation was invalid. For the appellants, it was argued, inter alia, that the letter of October 6, did not confer any new rights to the respondent and that if it did it was itself invalid as an instrument within the Ordinance which was not attested. The respondent did not seek to support the judge's finding that there was an express agreement between the appellants and the respondent authorising the respondent to seize the goods but submitted that as consent had been given to the seizure of the goods as shown by the letter of October 6, no trespass had been committed by the respondent.

Held –

- (i) the provisions of s. 15 of the Chattels Transfer Ordinance are mandatory and accordingly an unattested letter of hypothecation is invalid inter partes and confers no rights upon either of the parties thereto;
- (ii) in construing the legislation adopted from a Commonwealth country with a similar system of law, regard may be had to the judicial decisions of that country on the construction of the adopted legislation, if such decisions disclose a consistent interpretation of the legislation in question and are not at variance with one another;
- (iii) the respondent never sought to seize the goods by virtue of any authority created by the letter of October 6, 1960 and the letter did not seek to create any new rights but merely to confirm a position which created rights under the letter of hypothecation and as no rights existed under the letter of hypothecation no new rights were created by this letter; even if the letter created a right to seize, as opposed to recording an existing position, such a letter was an instrument within the Ordinance, and as it was not attested it was invalid inter partes and was not a defence to an action for trespass.

Appeal allowed. Cross-appeal dismissed.

Cases referred to in judgment:

- (1) *Te Aro Loan Co. v. Cameron* (1895) 14 N.Z.L.R. 411.
- (2) *R. v. Dibb Ido* (1897) 15 N.Z.L.R. 591.
- (3) *Lee v. The Official Assignee in Bankruptcy* (1903) 22 N.Z.L.R. 747.
- (4) *In re Franks* (1934) N.Z.L.R. 886.
- (5) *Gandhi & Others v. National & Grindlays Bank Ltd.*, Kenya Supreme Court Civil Case No. 668 of 1962 (unreported).

(6) *Dodhia v. National & Grindlays Bank Ltd.*, Kenya Supreme Court Civil Case No. 914 of 1962 (unreported).

(7) *Liverpool Borough Bank v. Turner* 70 E.R. 703.

(8) *Stirling v. Maitland* 122 E.R. 1043.

(9) *Ex parte Parsons* (1886) 16 Q.B.D. 532.

Judgment

The following judgments were read: **Newbold JA:** This appeal arises out of an action in which the plaintiffs, who carried on a business in partnership in Nairobi, sued the defendants, who were a bank and are hereinafter referred to as the bank, for, inter alia, damages resulting from a trespass alleged to have been committed by the bank in seizing the plaintiffs' stock-in-trade, which was the subject of a letter of hypothecation given as security for an overdraft with the bank. The trial proceeded on the basis that the only issue to be determined initially was the issue of liability; and only if that issue was determined in favour of the plaintiffs would the remaining issues in relation to damages be investigated. The trial judge gave judgment in favour of the bank and held that though the letter of hypothecation was invalid nevertheless no trespass had been committed. From this decision the plaintiffs appealed on a number of grounds, which raised issues both of fact and of law, and the bank cross-appealed asserting that the letter of hypothecation was valid.

So far as is relevant to the issues raised on appeal, the facts as found by the trial judge may be concisely stated as follows. On April 4, 1960, the plaintiffs opened a banking account with the bank and the bank undertook to provide overdraft facilities to the plaintiffs. The limit of the overdraft facilities then agreed was Shs. 140,000/- and the conditions attached thereto were that the amount was repayable on demand, that the account had to be conducted to the satisfaction of the bank and that the agreement was to come up for review on April 30, 1961. As security for such overdraft facilities the plaintiffs gave to the bank, inter alia, a letter of hypothecation over their stock-in-trade and certain other articles specified in the letter. This letter of hypothecation was signed by the plaintiffs on April 4, 1960, after the printed form had been duly filled in, though it was dated May 9, 1960. The letter of hypothecation was neither attested nor registered. Subsequently, on May 13, 1960, the bank wrote to the plaintiffs confirming the overdraft facilities. On a number of occasions the plaintiffs exceeded the limits of the overdraft facilities and on September 29, 1960, the bank extended the limit of the overdraft facilities by Shs. 10,000/- to Shs. 150,000/-, but this extension was for a period only until October 3, 1960. In consideration of this extension certain documents, including an extension of the limit set out in the letter of hypothecation, were handed to the plaintiffs for signature on the understanding that they would be returned to the bank. These documents were not returned and cheques were drawn in excess of the additional limit. On the morning of October 6, 1960, an official of the bank went to the premises of the plaintiffs with fresh documents and with instructions either to have the original documents, if signed, returned to the bank or to obtain the signature of the plaintiffs to these fresh documents. That morning the plaintiffs signed the fresh documents, which included an extension of the letter of hypothecation and a new guarantee. Later that morning two of the plaintiffs went to the bank and showed to an official of the bank a draft letter setting out that the plaintiffs were unable to pay their creditors, whereupon the plaintiffs were asked to reduce their overdraft to the agreed limit of Shs. 140,000/- and stated that they were unable to do so. Following upon, and consequent upon, this the bank, without any formal notice, caused the stock-in-trade and other articles of the plaintiffs to be seized under a power contained in the letter of hypothecation on the afternoon of October 6, and during the course of the seizure two of the plaintiffs voluntarily and with knowledge of its contents signed a letter, dated October 6, referring to the letter of hypothecation and authorising the seizure as the overdraft could not be reduced as promised.

On these facts the trial judge held that the letter of hypothecation was invalid and conferred no power on the bank to seize the goods, but that the bank had

committed no trespass in seizing the goods as the plaintiffs had expressly agreed to the goods being seized by the bank as security for the overdraft. Accordingly the trial judge determined the issue of liability in favour of the bank and dismissed the action with costs.

From this decision the plaintiffs appealed on a large number of grounds, some of which challenge the trial judge's findings of fact, in particular the conditions on which the overdraft was granted, the circumstances in which the limit was extended and the circumstances relating to the seizure of the goods, and others challenge his decision in law. The bank cross-appealed challenging the trial judge's decision that, by reason of lack of attestation, the letter of hypothecation was invalid as far as the plaintiffs were concerned. The issues which arise on this appeal are more clearly stated if they are looked at as a whole and without regard to the rather artificial distinction between the appeal and the cross appeal. These issues are as follows:

First, is the letter of hypothecation valid inter partes?

Secondly, if so, does cl. 9 of the letter of hypothecation effectively confer on the bank a power of seizure and was this power properly exercised?

Thirdly, if not, does the letter of October 6, authorizing the seizure provide a good defence to the bank against some or all of the plaintiffs?

Fourthly, if neither the letter of hypothecation nor the letter of October 6 entitles the bank to seize the goods is there any other authority which justifies the seizure?

Before I deal with the issues there are some general remarks which I should make. It is clear that as the bank has seized the goods of the plaintiffs then the bank is liable in trespass unless it can justify the seizure. During the course of the appeal an attempt was made by the plaintiffs to base their claim in the alternative in detinue or on a conversion subsequent to the seizure. In my view it is not open to the plaintiffs to make a claim in detinue as the pleadings neither aver the refusal of a demand nor claim the return of the goods. In any event the trial was not conducted on the basis that the claim arose out of detinue or a conversation subsequent to the seizure, the judge did not deal so with it and there is no ground of appeal relating to any such claim. In these circumstances I do not consider it open to the plaintiffs to raise these new claims at this stage. Generally, as regards the grounds of appeal relating to the findings of fact, the trial judge arrived at his findings in the majority of instances after having considered the credibility of the witnesses. The plaintiffs alleged, inter alia, fraud and duress on the part of the bank. The trial judge specifically found that he was unable to believe the main witness for the plaintiffs and that he believed the witnesses of the bank though on occasion the memory of one or more of them was at fault. In these circumstances as regards primary findings of fact I do not consider that on appeal those findings should be interfered with unless either it is clear that the trial judge has not taken proper advantage of seeing and hearing the witnesses or he has misdirected himself. The evidence was carefully analysed by counsel for the appellant and while it is clear that in certain instances the trial judge's findings may be at fault, and indeed counsel for the respondent did not attempt to support certain findings, nevertheless I am not satisfied that the trial judge has failed to take proper advantage of seeing and hearing the witnesses. Counsel for the appellant has urged that the judge misdirected himself in his comments and suppositions about one of the plaintiffs who was not called as a witness. I agree. It is not clear how the judge knew that the person in question was one of the plaintiffs and in my view the judge wrongly adopted the role of a witness in relation to a person who was not a witness in the trial. But I am satisfied that this misdirection of the trial judge was quite immaterial to his specific findings of primary fact and should not be the reason on which

to reverse such findings. As regards the presumptions drawn by the judge from the failure to call certain witnesses, the judge was perfectly entitled to make those presumptions under s. 114 illustration (g) of the Indian Evidence Act (now s. 119 of the Evidence Ordinance, 1963).

Turning now to the first issue, it is not in dispute that the letter of hypothecation is an instrument within the meaning of the Chattels Transfer Ordinance (Cap. 28 and hereinafter referred to as the Ordinance) and that it was not attested. Section 15 of the Ordinance reads as follows:

“15. Sealing shall not be essential to the validity of any instrument; but every execution of an instrument shall be attested by at least one witness, who shall add to his signature his residence and occupation.”

Does this section mean that if the instrument is not attested it is invalid for all purposes? Or does it mean that lack of attestation, whatever other effect it may have, does not invalidate the instrument between the parties thereto? Counsel for respondent in an able argument has submitted that the latter is the correct interpretation of the section. The steps in his argument are as follows: That Kenya adopted the Ordinance from New Zealand and that in so doing it must be assumed to have adopted each section with the meaning placed upon it by decisions of the New Zealand courts; that the New Zealand courts have interpreted the equivalent to s. 15 as meaning that lack of attestation does not invalidate the instrument inter partes and therefore s. 15 should bear the same meaning; and that in any event there is nothing in the Ordinance making an instrument which does not comply with the provisions of the Ordinance absolutely void but only void as against certain third parties; and in no case is the instrument made void as between the parties to the instrument.

I accept that when Kenya adopts the legislation of a Commonwealth country with a similar system of law then, in construing the provisions of the adopted legislation, regard should be had to the judicial decisions of the Commonwealth country on the meaning of the equivalent section. I accept that proposition subject to two qualifications: first that any such decision is not absolutely binding and may be disregarded if in the view of the East African court the decision is clearly wrong; and, secondly, that such decisions disclose a consistent interpretation of the section in question and are not at variance with one another. Counsel for the respondent referred to four New Zealand decisions and submitted that these decisions on the equivalent section to s. 15 disclose that lack of attestation does not invalidate the instrument inter partes. The first of these in chronological order is *Te Aro Loan Co. v. Cameron* (1). In this case it was held that the provisions of the New Zealand section were imperative, but that the instrument was properly attested when the attesting witness stated his occupation and residence as “Civil Service, Wellington”. The next case is *R. v. Dibb Ido* (2), where it was held that the provisions of the section were imperative and that an unattested instrument was invalid, but that at common law the transaction resulted in the property in the goods passing from the grantor of the instrument. The next is *Lee v. The Official Assignee in Bankruptcy* (3), where it was held that non-compliance with the provisions of the section does not invalidate the instrument inter partes but merely makes it incapable of registration. The last case is *In re Franks* (4), where it was held that failure to comply with the provisions of a different section which specifically provided that such failure invalidated the document “to the extent and as against” certain specified third parties did not result in the document being invalid inter partes. I consider that the only one of these decisions which supports counsel for the respondents submissions is *Lee’s* case (3). The decisions in the *Te Aro* case (1) and the *Dibb Ido* case (2) are, it would seem, contrary to his submissions as they hold that the provisions of the section are imperative; and the *Frank* case (4) does

not seem to me to be relevant. In my opinion these cases do not show a consistent interpretation by the New Zealand courts of the equivalent section as meaning that lack of attestation does not invalidate the document inter partes and in my view the courts in Kenya were completely free to come to their own conclusion on the effect of failure to comply with the provisions of s. 15 of the Ordinance. Reference was made to two Kenya decisions, one in 1962 and the other in 1963. In *Gandhi and Others v. National & Grindlays Bank Ltd.* (5), Mayers, J. on an application for an interim injunction held that the absence of specific provision making a defective instrument void as against the grantor probably resulted in the instrument being valid as against the grantee. In the course of his short ruling Mayers J. did not refer to s. 15 and he specifically stated that he was not in his ruling determining the validity of the instrument. In *Dodhia v. National & Grindlays Bank Ltd.* (6), Miles J., after a careful and exhaustive examination of the authorities, including the New Zealand decisions, and the Ordinance came to the conclusion that lack of attestation resulted in the instrument being invalid for all purposes. The trial judge arrived at the same conclusion and I consider that in order to determine whether or not he is correct it is only necessary to look at the provisions of the Ordinance as a whole applying the normal canons of construction.

In my view the determination of the first issue hinges upon whether the provisions of s. 15 are mandatory or directory. If the provisions are mandatory then the absence of any words specifically declaring the instrument void is immaterial. As Page Wood, V.-C. said in *Liverpool Borough Bank v. Turner* (7), (70 E.R. 3 at p. 707), "if the legislature enacts that a transaction must be carried out in a particular way, the words that otherwise it shall be invalid at law and in equity are mere surplusage." The first thing to be noticed is that the section refers specifically to validity in stating that sealing is not essential to validity and continues in words framed in the imperative, but every execution of an instrument "shall" be attested. Taken by itself that wording would appear to be mandatory and this appearance is strengthened when comparison is made with s. 22 which deals with the form of the instrument there the wording is that the instrument "may" be in the form set out in the schedule. Where two sections deal with the formal requirements of an instrument and in the one case the phraseology is imperative and in the other it is permissive, then there is a presumption that such difference is deliberate. When examination is made of the provisions of the Ordinance it is note-worthy that in every case where the instrument is specifically made invalid only as respects third parties for failure to comply with some provision, such failure would result in notice not being available to the third party of either the execution of the instrument or of the articles covered by the instrument. Such lack of notice might well prejudicially affect the rights of third parties, but would not be of importance inter partes. If, as I consider is the position after an examination of the Ordinance, the object of the legislature is to protect not only third parties but also the parties to any instrument, the requirement that some formal ceremony is essential to the validity of the document would be an obvious provision and would be one which the legislature considered essential to the validity of the instrument inter partes. I consider that the requirement of attestation not only to the execution of the instrument but also to the execution of a memorandum of satisfaction shows that the legislature desired to ensure that where the owner of goods conveys any interest or rights over those goods to secure the payment of money or the performance of any obligation, then, in protection both the borrower and the lender, the execution of the instrument charging the goods and the execution of the instrument discharging the goods have each to be attested in order to be valid. In my opinion s. 15 should be read as mandatory; to do otherwise is to disregard the words of the section and to

set at naught the intention of the legislature as ascertained from the provisions of the Ordinance as a whole. To say that an instrument which is not attested is perfectly valid between parties thereto is nothing other than to say that the words of s. 15 and of s. 34 requiring attestation are complete surplusage and are to be disregarded. I cannot accept that such is the position. Accordingly, I am satisfied that, by reason of lack of attestation, the letter of hypothecation of May 9, 1960, (as well, of course, as the extension of such letter executed on October 6, 1960) is invalid between the parties and confers no rights upon either of the parties thereto.

Having regard to my views on the first issue, it is unnecessary to deal with the second issue. This issue involves subsidiary issues of fact, for instance the terms upon which the overdraft was granted, and subsidiary issues of law, for instance whether the letter of May 13, 1960, must be regarded as having paramount effect over the terms of a printed letter of hypothecation and whether cl. 9 is contrary to any fundamental term of the contract. As the matter was, however, argued at some length I think I should state, without giving my reasons, that in my view, if the letter of hypothecation had been valid, the power conferred by cl. 9 thereof – which is merely a power to seize at any time – was both effective and validly exercised in the circumstances of this case even though in other circumstances such power might not properly be exercised in view of the principle referred to by Cockburn, C.J., in *Stirling v. Maitland* (8), (122 E.R. at p. 1047).

Turning now to the third issue, counsel for the respondent did not seek to support the judge in his finding that there was an express agreement between the plaintiffs and the bank authorising the bank to seize the goods. He put his case no higher than this: that the claim was in trespass; that a defence thereto would be consent to the taking of the goods; that two of the plaintiffs consented to such seizure, as is shown by the letter of October 6, and that they must be considered as having implied authority from the other three to give such consent. Counsel for the appellants submitted that the letter conferred no new rights; that if it did it was itself invalid as being an instrument within the Ordinance which was not attested; that in the circumstances the two partners could not be presumed to have implied authority to dispose of the business; and that if the letter conferred new rights there was no consideration for such agreements. It is clear that there was no evidence of any agreement authorising seizure other than such agreement as can be spelt out of the terms of the letter. The letter reads as follows:

“With reference to the Letter of Hypothecation executed by us on May 9, 1960, we hereby authorise you to take over our stocks (and then there were inserted the words ‘Sewing Machine(s) and spares’) as we regret that we are not in a position to reduce our overdraft as promised.”

One of the witnesses for the bank stated that the object in having the letter signed was to confirm that the plaintiffs were unable to reduce their overdraft. At no time did the bank seek to seize by virtue of any authority created by the letter and I think it quite clear that the letter does not seek to create any new rights but merely to confirm a position which created rights under the letter of hypothecation. This being so, if no rights existed under the letter of hypothecation then no rights are created by this letter. As Lord Esher, M.R. said in *Ex parte Parsons* (9) ((1886) 16 Q.B.D. at p. 542) in respect of a somewhat similar situation:

“It is clear that this was done in exercise of the right supposed to have been conferred by the original agreement. Townsend was not aware that he could withstand this supposed right, and he did not intend to give any new consent or enter into any new arrangement”.

I cannot for a moment believe that any of the plaintiffs would have consented to the bank seizing the stock-in-trade if they did not think that they were merely giving a formal and unnecessary consent to the exercise of a right which the bank had. If, in fact, it turns out that the bank did not have that right then the consent is nugatory and of no effect. If I am wrong in this view then in any event, quite apart from any question of the implied authority of one partner to sign on behalf of others, if the letter creates a right to seize, as opposed to recording an existing position, clearly it is an instrument within the Ordinance and, as it is not attested, it is, for reasons I have already stated, invalid *inter partes*. Finally apart from such invalid letter, there is no other evidence of the consent, even if such evidence were admissible, on which the bank relies to escape liability. Accordingly, I am satisfied that the letter of October 6, does not provide the bank with a good defence against any of the plaintiffs.

As regards the fourth issue, while there was some argument on the matter, it is not clear to me precisely how this issue is relevant as counsel for the respondent did not seek to justify the seizure on any grounds other than the letter of hypothecation and the consent. The issue may have arisen by reason of the decision of the trial judge. Assuming, but not deciding, that either at common law or in equity moveables can be made security for a loan in a manner not affected by the provisions of the Ordinance and without the possession of the moveables being given to the lender, I am quite satisfied that without express agreement such a transaction would not per se confer a right of seizure without legal proceedings. In this case, apart from cl. 9 of the letter of hypothecation, there was no evidence of any such agreement and any such evidence would in any event have been inadmissible. Accordingly, I am satisfied that there was no other authority which justified the seizure.

For these reasons I am of the opinion that the appeal succeeds. I arrive at this opinion somewhat reluctantly, though it may well be said that if a lender wishes to acquire a right to seize a debtor's goods, a right not normally possessed by a creditor, then the lender should ensure that he takes all the necessary steps to acquire the right. I would set aside the judgment and decree and remit the case to the Supreme Court with a direction to decide the remaining issues on the basis that the issue of liability had been decided against the bank. As regards the costs in the Supreme Court I would direct that they be within the discretion of the trial judge on the final determination by him of all the issues. As regards the costs of the appeal (including the costs arising out of the cross-appeal), I would direct that these be paid by the bank and I would give a certificate for two counsel.

Sir Trevor Gould VP: I have had the advantage of reading the judgment of Newbold, J.A. with whose reasoning and conclusions I agree: I wish to add only a few words of my own.

It is only with great reluctance that I am impelled to hold that a document between two parties, admittedly signed by one of them, cannot be relied upon by the other for lack of an attesting witness. That position may of course arise under the English Bills of Sale Acts in the light of the specific language used in s. 9 of the Amendment Act of 1882. Section 15 of the Chattels Transfer Ordinance (Cap. 28 Laws of Kenya) requires attestation by one witness, who shall add his residence and occupation, but leaves the result of failure to comply with that requirement to implication. However, agreeing, as I do, with the learned justice of appeal (and with two of the New Zealand cases mentioned by him) that the requirement of the section is mandatory, I am constrained to agree also that invalidity must follow if the requirement is not fulfilled, and there is nothing to exempt the parties from the completeness of that invalidity as there is where other sections of the Ordinance apply.

Having reached the conclusion that the letter of hypothecation is invalid as an “instrument” under the provisions of the Ordinance I do not find that the result of that invalidity can be avoided by any other approach to the instrument. In the New Zealand case of *R. v. Dibb Ido* (2) it appears to have been held (under similar legislation) that an instrument by way of security purporting to transfer goods by way of mortgage was invalid as such for lack of an attesting witness but was effective at common law to pass the property in the goods to the grantee. Even if that case is correctly decided (and I share the doubts on that point expressed by Miles J., in *Dodhia v. National & Grindlays Bank Ltd.* (6), it does not apply here. The letter of hypothecation did not purport to transfer the property in the chattels and no such question arises; it purported only to create a security and was acted upon as such when the seizure was made, and it is in just that capacity that the Ordinance declares it invalid. Clause 9 of the letter of hypothecation which gave a right to the bank to take possession of the goods at any time (and was relied upon by the bank) gave a right to the bank to substitute another form of security for the letter of hypothecation, but in essence the power given by the clause is part of the security contained in the letter of hypothecation. Even if regarded as a separate right it would itself fall within the provisions of the Ordinance as a licence to take possession of chattels. I think that the essence of the whole matter is this – that to justify the seizure the bank relied upon the letter of hypothecation and nothing else, that such reliance was upon the document as creating a security and that as such it was invalid under the Ordinance.

I would add a word on the third issue mentioned by the learned justice of appeal – whether the letter of October 6, 1960, provided a defence. I agree with the learned justice of appeal that the letter created no new rights or no enforceable rights. Looked at only as evidence of a consent (and putting aside the question of whether it bound all the appellants) the letter appears to me to denote no more than acquiescence in the exercise of a right believed to exist. The evidence that the seizure of the “Sewing Machine and spares” was queried and those words inserted in the letter after a telephone call had been made to the bank for verification, indicates that the appellants were prepared to acquiesce only so far as they considered they were bound. That is no more than absence of opposition to the exercise of such rights as the bank might possess and appears to me to fall short of a true consent which would afford a defence in trespass.

In the result the appeal is allowed and there will be the orders proposed in the judgment of the learned justice of appeal.

Duffus JA: I agree with the judgments of Newbold, J.A. and of Gould V.-P.

I also have with reluctance arrived at the decision that the letter of hypothecation are invalid especially as it was, in my view, the duty of the borrower, here the plaintiffs/appellants to ensure that the document which they executed for the purpose of securing the loan from the bank was properly and lawfully executed. The provisions of s. 15 of the Chattels Transfer Ordinance are in my opinion absolute and mandatory and the proper attestation of the execution of an instrument under that Ordinance is essential to its validity. In this case there has been no attempt to carry out the provisions of the section and as the Ordinance clearly applies to instruments such as the letters of hypothecation in this case, it follows that the document is invalid.

The document, however, covers a transaction that is in itself lawful and its illegality would not taint any other collateral agreement: I believe that the learned trial judge had this in mind when he considered the effects of an oral agreement but as GOULD, V.-P. points out in his judgment the bank relied on s. 9 of the letters of hypothecation to justify the seizure and this was an invalid document.

Apart from their rights under the document counsel for the respondents also relied on the fact that the plaintiffs had by the letter of October 6, (Exhibit C. 6) expressly agreed to the seizure and therefore could not complain of an act to which they had consented. The question was argued as to whether two partners could in these circumstances bind the other three absent partners, but in my view there is no necessity to decide this as I agree with Newbold, J.A. that the letter did not create any new right but only confirmed the rights which the parties believed already existed under the invalid letters of hypothecation. The letter specifically referred to the letters of hypothecation and in effect authorised a seizure under the terms of that document. I am of the view, therefore, that this letter would not justify the seizure by the bank as the document under which the seizure was in fact made by the bank was illegal and void.

I therefore agree that the bank will be liable in damages for the illegal seizure, and the order set out in the judgment of Newbold, J.A.

Appeal allowed. Cross-appeal dismissed.

For the appellants:

A. S. G. Kassam & Co., Nairobi

E. F. N. Gratiaen Q.C. (of the English Bar), J. M. Nazareth Q.C., Satish Gautama and Aziz Mohamed

For the respondent:

Hamilton, Harrison & Mathews, Nairobi

Bryan O'Donovan Q.C. and Sir Wiliam Lindsay

Leo Kahigwa and Amirali Karamali Rashid v Uganda

[1964] 1 EA 451 (HCU)

Division:	High Court of Uganda at Kampala
Date of judgment:	24 August 1964
Case Number:	152 and 165/1964
Before:	Sir Udo Udoma CJ
Sourced by:	LawAfrica

[1] Criminal law – Theft – Possession by thief originally lawful – Thief entrusted with conveyance of goods from Congo to Uganda – Instructions to deliver goods at certain place – Intention to steal goods formed and declared in Congo – Goods brought into Uganda and sold to person contrary to instructions – Where and when theft committed and completed.

Editor's Summary

The first appellant was charged with theft as an agent of 547 bags of coffee entrusted to him to take from

the Congo through the Uganda Customs post at Mpondwe for delivery to an agent of Ralli Brothers at Kasese, Uganda. The coffee was bought in the Congo by one B., the complainant, who put the first appellant in charge of the four lorries which were conveying the coffee to Uganda. The first appellant while at Kasindi in the Congo, instructed the four lorry drivers that, after clearing the Uganda customs at Mpondwe, they should drive their lorries with the coffee to Fort Portal instead of Kasese and the drivers drove past Kasese where the coffee was intended to be delivered. The coffee was sold and delivered to the second appellant at Fort Portal who paid Shs. 75,000/- to the first appellant. The second appellant was separately charged with receiving stolen property and both the appellants were jointly tried and convicted. At the trial a prosecution witness gave evidence to the effect that as soon as the coffee entered Uganda at Mpondwe it became the property of Ralli Brothers but the magistrate found that the legal ownership of the coffee was vested in B. The customs documents ex-facie indicated that the coffee was being exported from the Congo by S., a company in Stanleyville, and imported by Ralli Brothers, and there was also evidence that S., for a commission, had permitted B. the use of their licence for the purpose of exporting the coffee from the Congo. On appeal the main grounds of appeal argued on behalf of the first

appellant were that the charge preferred against him was materially defective in so far as there was no averment in the charge sheet that the property alleged to have been stolen was the property of any particular person and that the magistrate misdirected himself in holding that the legal ownership of coffee was vested in B., as, on the evidence, no particular ownership was established, the evidence on the ownership being diffused. It was submitted that the charge came within the exemption to s. 136(c)(1) of the Criminal Procedure Code and, therefore, it was necessary to describe the ownership of the property in the charge and that the omission to do so had embarrassed and prejudiced the first appellant in his defence. The main ground of appeal for the second appellant was that the magistrate misdirected himself in holding that the theft was not complete when the first appellant instructed the lorry drivers at Kasindi to divert the coffee to Fort Portal. It was contended that the instruction to divert the coffee to Fort Portal was an overt act sufficient to constitute theft; accordingly the theft was completed at Kasindi and the magistrate had no jurisdiction to try the case.

Held –

- (i) the exception contemplated in s. 136(c)(1) of the Criminal Procedure Code includes only cases of stealing involving special ownership of or interest in property, namely, theft by a part owner or by a person having an interest in the thing stolen and, as the first appellant had never claimed any interest in the coffee, he was not embarrassed or prejudiced by the omission to allege the ownership of the coffee;
- (ii) there was no material defect in the charge which was properly and correctly framed in compliance with s. 136(c)(1) *ibid.*; if there were any defect, it was cured by the verdict and no miscarriage of justice had been thereby occasioned;
- (iii) the finding of the magistrate that the coffee was the property of B., was not unreasonable and there was evidence to support it;
- (iv) the instruction given by the first appellant to the four drivers at Kasindi to drive to Fort Portal remained a mere declaration of future intention not accompanied by any overt act which could not have manifested itself until the lorries had driven past Kasese; therefore, the overt act took place when the lorries were diverted from Kasese to Fort Portal;
- (v) stealing by a person of property entrusted to him to convey and deliver to another person at a certain place is completed when three things happen contemporaneously, namely, (a) when there is an overt act by the person to whom the property has been entrusted showing a departure from his instructions in regard to the property; (b) such an overt act results in a wrongful gain to the person entrusted with the property; and (c) such an overt act results in a wrongful loss to the owners of the property;
- (vi) the theft was not completed until the sale of the coffee to the second appellant at Fort Portal, because it was only then that the overt act, notably the diversion of coffee from Kasese to Fort Portal, could be said to have resulted both in wrongful gain to the first appellant and a wrongful loss to B. *R. v. Nanji Sunderji* (1), applied.
- (vii) as the theft was committed at Fort Portal within Uganda the magistrate had jurisdiction to try the case.

Appeals dismissed.

Cases referred to in judgment:

- (1) *R. v. Nanji Sunderji* (1935), 2 E.A.C.A. 130.
- (2) *R. v. Watson*, [1916] 2 K.B. 385; [1916] All E.R. Rep. 815
- (3) *Hobson v. Impett* 41 Cr. App. R. 138.
- (4) *Said Kigozi v. R.* (1958). E.A.C.A. (U).

(5) *Davies v. The Director of Public Prosecutions* [1954], 1 All E.R. 507.

(6) *Cainisio Walwa v. R.* (1956), E.A.C.A. 453.

Judgment

Sir Udo Udoma CJ: in this judgment the appellant, Leo Kahigwa, in Appeal No. 165 of 1964, will hereinafter be referred to as the first appellant and the appellant, Amirali Karamali Rashid, in Appeal No. 152 of 1964, will hereinafter be referred to as the second appellant, that being the order in which they both had appeared before the magistrate at the trial.

The first and second appellants are appealing against the decision of the Resident Magistrate, District Court, Toro, sitting at Fort Portal, in which the first appellant was convicted of stealing, with which he alone was charged in the first count, and the second appellant of receiving stolen property, with which he too was separately charged in the second count, the charge itself comprising two separate counts only. The first and second appellants were jointly tried. On conviction they were each sentenced to three years imprisonment. Against that conviction they have now appealed and have filed separate grounds of appeal. In addition the second appellant also appeals against his sentence. The two appeals were heard together.

In respect of each appellant altogether eight grounds of appeal were argued, Counsel for the first appellant being granted leave of appeal to argue on behalf of the first appellant his eighth ground of appeal at the hearing, which he argued first. His seventh ground of appeal was abandoned by leave.

For the purpose of this judgment only the grounds which were argued separately need be set out herein. The principal grounds argued on behalf of the first appellant were grounds eight and four in that order, and read as follows:

- “8. The charge preferred against the appellant is materially defective in so far as there is no averment in the charge sheet affirming that the property alleged to have been stolen was the property of a particular person. Therefore the charge sheet is vague and does not disclose any offence. And
4. That the court below misdirected itself in holding that the legal ownership of coffee was vested in the complainant, i.e. Basil.”

Grounds 1, 2, 3, 5 and 6 of the first appellant’s appeal were like grounds 4, 5, 6 and 7 of the second appellant’s appeal argued together under the general head, namely, that the decision of the learned trial magistrate was unwarranted, unreasonable and cannot be supported having regard to the evidence.

The grounds argued separately on behalf of the second appellant were grounds 1, 2 and 3, which are set out hereunder:

- “1. The learned magistrate misdirected himself that the theft was not complete when the first accused instructed the lorry drivers to divert the coffee to Fort Portal.
2. The learned magistrate erred in holding that the appellant knew or must have known that the coffee was stolen; and
3. The learned magistrate erred in relying on the evidence of Jeraj or in holding that there was any material corroboration of his evidence implicating the appellant.”

It is unnecessary to summarise the evidence which was before the learned trial magistrate as the facts of the case will emerge in the course of my dealing

with the various grounds of appeal argued. I propose therefore to proceed to consider the grounds set out above separately and in detail, commencing with the appeal of the first appellant, except that on the general ground, namely, that the decision of the learned trial magistrate was unwarranted, unreasonable and cannot be supported having regard to the evidence, the submissions made on behalf of the first and second appellants will be considered together.

Counsel for the first appellant, submitted in respect of the ground eight that, as there was no averment of the ownership in the charge of the the property alleged to have been stolen, the defence was embarrassed and prejudiced as the first appellant did not know who the owner of the property was, the charge failing therefore to disclose any offence under s. 252 of the Penal Code. He contended further that the charge came within the exception provided for in s. 136(c)(1) of the Criminal Procedure Code and that it was therefore necessary to lay the ownership of the property stolen in the charge on someone.

This submission was opposed by counsel for the respondent who submitted that the charge was perfectly in order and did not come within the exception provided for in s. 136(c)(1) of the Criminal Procedure Code. It was also submitted that, if even the charge was defective, such defect was cured by the verdict as the counsel for the first appellant did not raise any objection as to the charge at the trial.

The charge complained of is in the following terms:

First Count

Statement of Offence

Theft by agent contrary to ss. 252 and 260(b) of the Penal Code.

Particulars of Offence

“Leo Kahigwa on or about the 13th day of September 1963 at Fort Portal in the Kingdom of Toro stole 547 bags of clean robusta coffee valued at Shs. 75,000/- which had been entrusted to him, the said Leo Kahigwa, to deliver to Congo Links at Kasese.”

The complaint by counsel for the first appellant is that the omission to describe in the particulars of the charge the ownership of the 547 bags of coffee alleged to have been stolen is such a defect as to have prejudiced the first appellant in his defence.

The first appellant was charged under s. 252 and 260(b) of the Penal Code of stealing 547 bags of clean robusta coffee entrusted to him to deliver to Congo Links at Kasese. Under s. 252 of the Penal Code, to which I was referred by counsel, the “felony termed theft” is said to be committed by “anyone who steals anything capable of being stolen”. According to that definition, emphasis would appear to be on the phrase “anything capable of being stolen” and not on the ownership of the thing stolen. But by reason of the definition of the phrase “anything capable of being stolen” as contained in s. 224 of the Penal Code, it seems clear that there is implicit in the phrase “anything capable of being stolen” the concept of ownership of the thing stolen, although the ownership of the property stolen does not appear to receive any special emphasis.

The framing of charges is, however, not regulated by s. 252 of the Penal Code but by s. 136 of the Criminal Procedure Code, in sub-s. (c)(1) whereof are to be found the following provisions:

“The description of property in a charge or indictment shall be in ordinary language, and such as to indicate with reasonable clearness the property referred to, and, if the property is so described, it shall not be necessary (except when required for the purpose of describing an offence dependent

on any special ownership of property or special value of property) to name the person to whom the property belongs or the value of the property.”

Although counsel’s contention was that the offence involved in the instant appeal came within the exception in the provisions of s. 136(c)(1) of the Criminal Procedure Code, which made it necessary to describe the ownership of the property in the charge, there was no attempt made to satisfy this court or even to show how the offence with which the appellant was charged came within this exception. The exception contemplated in s. 136(c)(1) of the Criminal Procedure Code would, in my view, include any cases of stealing involving special ownership of or interest in property, e.g. theft by a part-owner or by a person having an interest in the thing stolen. The first appellant never claimed any interest in the coffee, with the transportation of which to Uganda he was entrusted. It is therefore difficult to see how he was embarrassed by the charge as framed.

On the evidence before the court of trial, there was no dispute that the first appellant was placed in charge of the 547 bags of coffee by Basil Yaortoglou (PW.2). In his statement, Exhibit 11 (English translation Exhibit 12) the first appellant freely admitted that it was Basil Yaortoglou (PW.2) who had engaged him to convey the coffee to Uganda. It seems to me unsound therefore to submit, as has been submitted by counsel, that the first appellant was embarrassed or prejudiced by the omission to allege in the charge that the bags of coffee were the property of some person.

There was no material defect in the charge. It was properly and correctly framed in due compliance with s. 136(c)(1) of the Criminal Procedure Code. I am satisfied that it is unreasonable for counsel now to complain that the first appellant was in any way embarrassed or prejudiced by the omission to describe the bags of coffee as the property of some owner. The first appellant was well aware of the ownership of the said bags of coffee.

It is to be noted that throughout the trial no objection as to any defect in the charge was raised by the counsel for the first appellant, and even in this court this ground was only, by leave, added to the grounds of appeal at the last moment. If, indeed, there was any defect, and I can find none, the same was cured by the verdict and no miscarriage of justice has been occasioned thereby. This ground of appeal therefore fails.

It was also submitted for the first appellant on the fourth ground of appeal that the learned trial magistrate misdirected himself in holding that the legal ownership of the coffee was vested in the complainant, i.e. Basil Yaortoglou (PW.2), as, on the evidence, no particular ownership was established, the evidence on the issue of ownership being diffused. For the respondent, it was contended that there was evidence to support the finding by the learned magistrate that Basil Yaortoglu (PW.2) was the legal owner of the coffee.

The evidence given by Phaedon George Sideris (PW.1) to the effect that as soon as the coffee entered Uganda at Mpondwe it became the property of Ralli Brother Groups, considered superficially, does lend colour to, and must have given cause for the submission that the ownership of the coffee was uncertain, having regard to the claim by Basil Yaortoglou (PW.2) that the coffee was his property and the declaration in the customs form, Exhibit 4, to the effect that Sogecongo was the exporter of the coffee. But it is clear that the declaration on the customs form, Exhibit 4, was only in fulfilment of customs requirements. As the Customs Officer (PW.4) explained, irrespective of the true owner, the coffee was ex facie customs documents exported from the Congo by Sogecongo, a company in Stanleyville; and imported by Ralli Brothers Group of East Africa into Uganda. Mere exportation and importation would not of themselves establish the true ownership of the coffee because for customs purposes exporters or

importers are not coterminous with owners.

On the evidence, it was Sogecongo who, for a commission, permitted Basil Yaortoglou (PW.2) the use of their licence for the purpose of exporting the coffee from the Congo. The evidence of Basil Yaortoglou (PW.2) was that he had bought the coffee at the total price of Shs. 148,862/44 or roughly £7,443 sterling in the Congo, in support of which evidence the receipt, Exhibit 3, was tendered and was accepted by the learned trial magistrate. Nothing has been suggested to show that it was unreasonable for the learned trial magistrate so to have accepted that evidence.

Ralli Brothers could only notionally be described as owners of the coffee for insurance and customs purposes. They were mere importers. The coffee was not bought by them nor did they pay anything by way of price for it. To describe Ralli Brothers as owners of the coffee was a mere fiction, for the coffee would only in law become the property of Ralli Brothers after the same, together with all necessary documents, would have been in fact delivered to Messrs. Congo Links at Kasese as the forwarding agents for Ralli Brothers and Basil Yaortoglou (PW.2) would have received an advance payment on the price, pending the final payment at Kilindini, Mombasa.

It is therefore impossible to uphold the contention of counsel that the learned trial magistrate was wrong in law in finding, as he did, that the coffee was the property of Basil Yaortoglou (PW.2). It cannot truly be said that such finding was unreasonable on the evidence or that there was no evidence to support it. This ground of appeal also fails. It is rejected.

Subject to consideration being given to grounds 1, 2, 3, 5 and 6 of the grounds of appeal of the first appellant at a later stage in this judgment under the general head, namely, that the decision is unreasonable etc., I turn now to consider the submission of law made on behalf of the second appellant.

For the second appellant, three principal grounds set out above and dealing with questions of law were separately argued by counsel, the most important of these being ground 1, namely “that the learned magistrate misdirected himself that the theft was not complete when the first accused instructed the lorry drivers to divert the coffee to Fort Portal.”

In support of this ground counsel for the second appellant, in an interesting and impressive argument submitted that the theft of the coffee, on the evidence of the prosecution, had occurred at Kasindi in the Congo before ever the coffee arrived at Mpondwe, which is the Customs Post on the Uganda border with the Congo. Three main reasons were advanced by counsel for this submission and may be summarised as follows:

- (1) The evidence of the two drivers – Perezi Lule (PW.9) and Christopher Kaizi (PW.10) – both of whom were called by, and testified for the prosecution to the effect that the first appellant had instructed them after clearing the Uganda Customs at Mpondwe they should drive their lorries with their full loads of coffee to Fort Portal.
- (2) The evidence of Phaeton George Sideris (PW.1) to the effect that once the coffee crossed the Uganda Customs Post at Mpondwe into Uganda it became the property of Ralli Brothers; and
- (3) The fact that the coffee was described in the second count of the charge as the property of Basil Yaortoglou (PW.2), that being an admission by the prosecution, it was contended, that the theft had in fact occurred in the Congo, the first appellant himself having been arrested in the Congo for the theft.

It was submitted by counsel that, for the above reasons, the learned trial magistrate had no jurisdiction to have tried the case as the offence of theft was committed by the first appellant at Kasindi in the Congo outside Uganda territory and therefore outside the jurisdiction of the magistrate, because, it

was said, that the instruction to divert the coffee to Fort Portal was an overt act sufficient to constitute theft in law. On the authority of *R. v. Nanji Sunderji* (1) counsel submitted that once the first appellant had by some overt act shown a departure from the instruction given to him by Basil Yaortoglou (PW.2) over the property entrusted to him for conveyance to Kilindini, Mombasa, by diverting it to Fort Portal, the offence of theft by the first appellant was completed. For this reason, it was submitted that the learned trial magistrate was wrong to have held that he had jurisdiction to try the case, because the instruction to convey the coffee to Fort Portal was not a mere declaration of a future intention incapable of fulfilment at the time by the first appellant as was held by the learned trial magistrate.

These are attractive and weighty arguments and warrant careful consideration. They cannot be swept aside as lacking in substance.

It is true of course that both Perezi Lule (PW.9) and Christopher Kaizi (PW.10), the two drivers, testified that it was at Kasindi Customs Post in the Congo that the first appellant instructed them to drive to Fort Portal or Toro. But it must also be remembered that Perezi Lule (PW.9) was treated as a hostile witness. His testimony was therefore tainted and of little effect. All the same the learned trial magistrate did accept the evidence that the first appellant did give such instructions. It was on that footing that he gave consideration to the submission on the issue of jurisdiction made to him by counsel for the first appellant. That submission the learned trial magistrate had very carefully considered and over-ruled by concluding that he had jurisdiction to try the case. The complaint now to be examined is that conclusion was wrong in law. I do not however agree that merely to describe the coffee in the second count of the charge as the property of Basil Yaortoglou (PW.2) is sufficient to constitute an admission by the prosecution that the theft had occurred in the Congo, nor indeed would the fact that the first appellant was arrested in the Congo.

I am of the view that although the facts, issues and circumstances of the instant case are distinguishable from the facts, issues and circumstances of the case *R. v. Nanji Sunderji* (1) cited and relied upon by counsel, the principle of law therein established would apply with equal effect to the facts, circumstances and issues raised in the instant case. In *R. v. Nanji Sunderji* (1) the material facts were as follows:

- (1) That the second and third witnesses in that case were given a bale of paper by the first witness to convey to the station;
- (2) That the second and third witnesses on the way to the station decided to sell the bale to the appellant in that case, i.e. accused No. 1, i.e. Nanji Sunderji; and
- (3) That the second and third witnesses sold the bale to the appellant, i.e. Nanji Sunderji at a low price.

On the above facts the point argued by counsel for Nanji Sunderji, the appellant in that case, was that the bale was not stolen prior to its receipt by Nanji Sunderji and therefore that a case for receiving stolen goods could not be sustained. It was not then disputed that if the goods had been stolen by the second and third witnesses prior to the receipt by Nanji Sunderji that the receiving would have been dishonest.

The only question for determination by the court in that appeal was as to the stage at which the theft of the goods alleged to have been stolen had occurred so as to constitute a foundation for the offence of receiving. Put directly, the question was – Was it prior to or after the receipt of the goods that the theft was committed? Surely the significance of this question in relation to the facts in *Nanji Sunderji* must be that since possession of the bale was lawfully obtained

in the first instance, it was necessary to determine the stage at which possession of the same on the part of the second and third witnesses became unlawful. It was necessary to determine the stage at which conversion took place. And the Court of Appeal held that whether or not the intention to sell be conceived at or after receipt of the property, *as soon as there is an overt act showing a departure from the instructions in regard to the property which results in wrongful gain to the person entrusted with the property and a wrongful loss to the owner of the property*, the offence of theft is completed, and so the foundation for a case of receiving with guilty knowledge laid.

I think the point in that judgment which ought to be emphasised must be found in the phrase:

“As soon as there is an overt act showing a departure from the instruction in regard to the property which results in a wrongful gain to the person entrusted with the property and a wrongful loss to the owner of the property.”

On the basis of that decision, the principle would appear to have been established that stealing by a person of property entrusted to him to convey and deliver to another person at a certain or particular place is completed when three things happen contemporaneously, namely:

- (1) When there is an overt act by the person to whom the property has been entrusted showing a departure from his instructions in regard to the property;
- (2) Such an overt act results in a wrongful gain to the person entrusted with the property; and
- (3) Such an overt act results in a wrongful loss to the owner of the property.

It is only when these conditions co-exist that it would be correct to say that the theft of the property has been completed.

It must be remembered that a person entrusted with property to deliver in specie to someone else at a given place as a bailee and must deliver the property in specie to such person. For then no ownership is transferred to him. It seems therefore that the theft of such property would only occur when the bailee deals with the property in such a wrongful manner as to confer upon himself certain benefits inconsistent with or destructive of the right of the true owner.

In the instant case, on the evidence, the first appellant was entrusted with 547 bags of coffee to take from the Congo through the Uganda Customs Post at Mpondwe into Uganda and to deliver the same at Kasese also in Uganda. The first appellant on taking charge of the goods instructed the four lorry drivers who were conveying the goods to drive to Fort Portal instead of to Kasese. The learned trial magistrate found that to get to Fort Portal the drivers drove past Kasese where the goods were intended to be delivered but without delivering the goods there. In his evidence Sergeant Paskali Lasto (PW.7) testified that on the way from Mpondwe to Fort Portal they had to stop at Kasese. From that evidence inference may be drawn that Kasese lies between Mpondwe and Fort Portal. There is no evidence that there is another road from Mpondwe to Fort Portal.

From this it follows, I think, that the instruction given by the first appellant to the four drivers to drive to Fort Portal could not have manifested itself until after the lorries had driven past Kasese, that is to say, within Uganda territory. In which case, the instruction at Kasindi remains a mere declaration of future intention not accompanied by any overt act, the overt act taking place when the lorries diverted from Kasese in Uganda to Fort Portal also in Uganda. Applying the principle established in *R. v. Nanji Sunderji* (1) to the facts of the

instant case, it is clear that if even the declaration of intention at Kasindi in the Congo could be regarded as an overt act, which it is not, then the theft of the 547 bags of coffee was not completed until the sale of the coffee at Fort Portal, because it was only then that the overt act, notably the diversion of the coffee from Kasese to Fort Portal, could be said to have resulted both in wrongful gain to the first appellant and a wrongful loss to Basil Yaortoglou (PW.2). By the fraudulent sale of the coffee at Fort Portal the first appellant benefited himself in the sum of Shs. 75,000/-, the price at which the coffee was sold, and Basil Yaortoglou (PW.2) sustained a wrongful loss of his 547 bags of coffee.

In the circumstances, I am of the opinion that the learned trial magistrate was right in holding that he had jurisdiction to try the case. I agree with him that the offence of stealing was committed in Uganda and not in the Congo. This ground of appeal must therefore fail. It is rejected.

The next ground for consideration is that the learned magistrate erred in holding that the appellant knew or must have known that the coffee was stolen. On this ground it was contended that the learned trial magistrate was wrong to have accepted the evidence of Pyarali Jeraj (PW.14) in preference to the evidence of the second appellant, who, it was submitted, was only used as a cat's paw by Pyarali Jeraj (PW.14) and particularly as the story told by the second appellant was corroborated by the first appellant that the sale of the coffee was directly to Pyarali Jeraj (PW.14).

It was contended that the second appellant only acted as a cat's paw – a conduit pipe that is – for Pyarali Jeraj (PW.14) in allowing the coffee to be stored in his employer's store before it was transferred into Pyarali Jeraj's (PW.14) store, and therefore that it was wrong in law for the learned trial magistrate to have held that the second appellant knew or must have known that the coffee was stolen. In support of this contention counsel cited and relied upon *R. v. Watson* (2), *Hobson v. Impett* (3) and *Said Kigozi v. R.* (4) in which *Hobson v. Impett* (3) was considered and distinguished.

In *R. v. Watson* (2) it was held that a person who negotiates for the sale of goods which he knows to have been stolen cannot be convicted of receiving the goods knowing them to have been stolen unless it is also proved that he has been in possession and control of the goods. And *Hobson v. Impett* (3) laid down that if a person knows that goods are stolen and puts his hand on them the mere manual possession does not itself make him guilty of receiving stolen goods because the control of the goods may be in someone else.

I respectfully agree with the principles of law established in both these cases which, in my view, do not support the case put forward for the second appellant, but apply with telling effect to, and fully support the decision of the learned trial magistrate in the instant case. It is of course true that the facts and circumstances of the case under consideration are like the facts and circumstances in *Said Kigozi v. R.* (4) distinguishable from the facts and circumstances established in *R. v. Watson* (2) and *Hobson v. Impett* (3). In the instant case the second appellant admitted in his evidence:

- (1) That he it was who opened the store and ordered the coffee to be discharged from the lorries into the store where it was stored on his instruction;
- (2) That he supervised the unloading of the lorries into the store;
- (3) That on his instruction the coffee was subsequently transferred into Pyarali Jeraj's (PW.14) store;
- (4) That he paid the first appellant the price of Shs. 75,000/- on cashing a cheque made out in his name from the Bank;

- (5) That he engaged and also paid the labourers who off loaded the coffee into his store;
- (6) That he had ample opportunity of observing marks on the coffee bags although he did not remember noticing such marks as indicating that the coffee came from the Congo and was intended for Kilindi, Mombasa; and
- (7) That he did all these on his own and without reference to his employers and without their authority.

On these admission, it is quite obvious that the second appellant was not merely being used as a cat's paw by Pyarali Jeraj (PW.14) as has been contended. It would be unreasonable to hold that on the authorities of *R. v. Watson* (2) and *Hobson v. Impett* (3) the second appellant was merely negotiating the sale of the coffee or that he merely put his hand on it without being in possession of it or without exercising control over it. It is clear, I think, that it was from these admissions considered together with the evidence of the prosecution that the learned trial magistrate drew the inference, which I consider reasonable and irresistible, that the second appellant must have known that the coffee was stolen. The learned trial magistrate also applied the doctrine of recent possession. On the facts, he found that the second appellant was in physical possession of the stolen coffee. On this point the learned trial magistrate said:

"I am also satisfied that Kahigwa (second appellant) was in physical possession of the stolen coffee when he ordered its unloading into a store over which he had control and that at the time he received it he knew perfectly well it was stolen. All the elements have been proved beyond doubt on the evidence before me."

It would, in my view, be unreasonable to hold that the learned trial magistrate was wrong in finding as he did, as there was ample evidence to support these findings.

It was difficult to follow counsel's other submission on this ground, namely, that the learned trial magistrate was wrong to have accepted the evidence of Pyarali Jeraj (PW.14) in preference to the evidence of the second appellant. Here was a case which depended to a large extent on the oral testimony of witnesses. It was surely for the magistrate to assess the credit of the witnesses testifying before him by weighing and checking the evidence of each such witness against the circumstances surrounding the whole case and then making up his mind as to which of the witnesses spoke the truth. I am satisfied that the magistrate was justified in rejecting the defence of the second appellant. The explanation offered by the second appellant as to the part he had played in the sale and purchase of the stolen coffee does not appear to make sense. It was an incredible story. This ground of appeal therefore fails.

It was also submitted on the third ground of appeal that on the authorities of *Davies v. The Director of Public Prosecutions* (5) and *Canisio Walwa v. R.* (6) the learned trial magistrate was wrong in law to have convicted the second appellant on the uncorroborated evidence of Pyarali Jeraj (PW.14). There is no substance in this submission. The learned trial magistrate in a carefully worded passage of the judgment duly warned himself of the danger of convicting the second appellant on the uncorroborated evidence not only of Pyarali Jeraj (PW.14) but also of Badru Juma (PW.12), both of whom he treated as accomplices. It was only after a careful examination of the evidence that the learned trial magistrate held that what Pyarali Jeraj (PW.14) told him about the transaction between him and the second appellant was the truth. He then found that apart from the evidence of Pyarali Jeraj and Badru Juma the case against the second appellant was proved by cogent evidence. He, having duly warned

himself and having accepted the evidence of the prosecution as against the second appellant considered together with the evidence of the second appellant himself in so far as the same was consistent with the evidence of the prosecution, was entitled to convict the second appellant of the offence of receiving stolen property. This ground of appeal also fails.

On grounds 1, 2, 3, 5 and 6 of the first appellant's appeal and grounds 4, 5, 6 and 7 of the second appellant's appeal, all of which were argued separately and jointly under the general head that the decision was unwarranted, unreasonable and cannot be supported having regard to the evidence, on a careful consideration and minute examination of the whole of the evidence, admirably summarised and equally carefully considered by the learned trial magistrate, it is impossible to say that the learned trial magistrate was wrong as there was ample evidence to support both his findings and decisions. In my view this court would not be right nor justified in disturbing such findings and decisions or in interfering with the sentence passed by the learned trial magistrate on the second appellant, which in the circumstances disclosed by the evidence, it is also impossible to say was unreasonable or excessive. In the circumstances these appeals are dismissed. Both the conviction and sentences are affirmed. Order accordingly.

Appeal dismissed.

For the first appellant:

Kiwanuka & Co., Kampala

L. Sebalu

For the second appellant:

Dalal & Singh, Kampala

A. R. Kapila and S. H. Dalal

For the respondent:

The Director of Public Prosecutions, Uganda

M. P. Radia (State Attorney, Uganda)

Juma Ali v Republic
[1964] 1 EA 461 (HCT)

Division:	High Court of Tanganyika at Dar-es-Salaam
Date of judgment:	23 March 1964
Case Number:	15/1964
Before:	Sir Ralph Windham, CJ Law and Spry JJ
Sourced by:	LawAfrica

[1] Criminal law – Trial – Witness – Right of court to call witness – Witnesses called after defence case closed – Witnesses whose evidence essential to just decision – Whether discretion to call witness properly exercised.

Editor's Summary

The appellant was convicted of cattle theft. The case against him was that he had stolen three head of cattle from a herd entrusted to his care and had sold them. The appellant's father stated in his evidence that he had found the herd, less the stolen cattle, in the boma of one S. and the defence was that the appellant had sold three cattle on his father's instructions and had handed to his father the proceeds of sale; and that his brother J. was with him part of the time when this happened. After the defence case was closed the magistrate decided that the evidence of S. and J. was necessary and, acting under s. 151 of the Criminal Procedure Code, he summoned both of them as court witnesses. On appeal,

Held –

- (i) in Tanganyika the test to be applied in deciding whether or not a witness was properly called by a court after the defence case has closed is not the test applied in England, namely, that the calling of such witnesses should be limited to something which has arisen ex-improviso, which no human ingenuity could foresee. *Omari Ramadhani v. R.* (1) disapproved.

- (ii) under the first part of s. 151 of the Criminal Procedure Code the court has a general discretionary power to call or recall witnesses, a power which must be exercised judicially and reasonably, and not in any way likely to cause prejudice to the accused;
- (iii) under the second part of s. 151 *ibid.* once the court forms the opinion that certain evidence is essential to the just decision of the case, then the court is under a duty to call a witness or witnesses to give that evidence;
- (iv) whether the magistrate acted under the first or second part of s. 151 *ibid.* the power to call witnesses exercised by him after the defence case had closed was exercised judicially and reasonably.

Appeal dismissed.

Cases referred to in judgment:

- (1) *Omari Ramadhani v. R.* (1926), E.A. 487 (T).
- (2) *Hussein Saleh v. R.* (1954), 2 T.L.R. (R) 91.
- (3) *Manyaki Nyaganya and others v. R.* (1958), E.A. 495 (C.A.).
- (4) *Kulukana Otima v. R.* (1963), E.A. 253 (C.A.).

Judgment

Sir Ralph Windham CJ: read the following judgment of the court:

This is an appeal against conviction and sentence. The appellant was convicted of cattle theft, contrary to ss. 268 and 265 of the Penal Code, was sentenced to three years imprisonment and twenty-four strokes of corporal punishment, in accordance with ss. 4 and 5 of the Minimum Sentences Act, 1963. There are no merits in the appeal against conviction, as the trial magistrate's finding that the accused was guilty of the offence charged is fully supported by the evidence. The sentence is the minimum prescribed by law. This appeal was set down for hearing before a full bench because, in the course of the trial, after the close of the defence, the trial magistrate called two witnesses as court witnesses. Section 151 of the Criminal Procedure Code appears to confer the necessary power. It reads as follows:

“151. Any court may, at any stage of an inquiry, trial or other proceeding under this Code., summon any person as a witness, or examine any person in attendance, though not summoned as a witness, or recall or re-examine any person already examined, and the court shall summon and examine or recall and re-examine any such person if his evidence appears to it essential to the just decision of the case.”

The question is whether, having regard to the circumstances of this particular case, the power was properly exercised.

The case against the accused was that he stole three head of cattle from a herd entrusted to his care, and sold the animals at a cattle market to one Omari Ismail. The accused's father deposed that he found the herd, less the stolen beasts, in the boma of one Sembweza.

The accused defence was that he sold three animals on his father's instructions, and handed him the

proceeds of sale, and he deposed that his brother John was with him part of the time. The trial magistrate then decided that the evidence of Sembweza and John was necessary, and adjourned the case so that these persons could be summoned as court witnesses. Their evidence proved adverse to the accused. In a careful and reasoned judgment, the trial magistrate reviewed all the evidence, and was left without any reasonable doubt as to the accused's guilt.

Section 151 of the Criminal Procedure Code was considered in *Omari Ramadhani v. R.* (1) by Mosdell, J. who, following a dictum of Harbord, J's in *Hussein Salehe v. R.* (2) held that the powers conferred by s. 151, in spite of the wide terms of the section, should be subject to the same limitation as is placed on the exercise of similar rights in similar cases in England, and that the calling of witnesses after the close of the defence should be limited to cases where something had arisen ex-improviso, which no human ingenuity could foresee. Mosdell, J's attention does not seem to have been drawn to the decision of the Court of Appeal in *Manyaki Nyaganya and Others v. R.* (3) which lays down that a court in Tanganyika is under a statutory duty, once it comes to the conclusion that evidence is essential to the just decision of the case, to call the person who can give such evidence, and to do so whatever the effect of the evidence might be. The Court of Appeal came to the same conclusion in *Kulukana Otima v. R.* (4) when it considered s. 148 (1) of the Criminal Procedure Code of Uganda, which is identical with s. 151 of the Tanganyika Code. The court held that the first part of that section confers a discretion upon the judge, but that under the second part, if it appears to the judge that the evidence of a person is essential to the just decision of the case. The judge has a mandatory duty to himself to call the person. In the course of the judgment of the court, ((1963) E.A. at p. 257), this passage occurs:

“The position in Uganda as to a judge's power in that behalf is not the same as in England.”

We respectfully agree, so far as Tanganyika is concerned. The test to be applied in deciding whether or not a witness was properly called by a court after the close of the defence is not the test applied in England, that is to say, that the calling of such witnesses should be limited to something which has arisen ex-improviso, which no human ingenuity could foresee. The position in Tanganyika is, in our opinion, that under the first part of s. 151 the court has a general discretionary power to call or recall witnesses, a power which must be exercised judicially and reasonably, and not in a way likely to cause prejudice to the accused. Under the second part of the section, once the court forms the opinion that certain evidence is essential to the just decision of the case, the court is under a duty to call a witness or witnesses to give that evidence, whatever its effect is likely to be.

In the case now under consideration it is not absolutely clear under which part of the section the trial magistrate acted in deciding to call the two witnesses after the close of the defence. The record reads:

“This case requires evidence by Sembweza Sekiondo and John Amani – court's witnesses”.

It would seem that the trial magistrate considered the presence of these witnesses essential for the just decision of the case; if so, he was under a duty to summon and examine them as he did. But even if he was exercising a discretionary power under the first part of s. 151, we are of opinion that the trial magistrate acted perfectly properly in summoning and examining the witnesses. Their names had been mentioned in the course of the hearing, as being persons having knowledge of the facts of the case. The second man, John Amani, was the accused's brother, and was mentioned by the accused in the course of his evidence. The magistrate had no prior knowledge whether the evidence of these two men would be favourable or adverse to the accused. He thought that they might be able to give evidence relevant to the charge, and he exercised his discretion and decided to call them. In our opinion, he exercised that discretion judicially and reasonably.

As indicated on March 6, 1964 this appeal fails and is dismissed, both as regards conviction and sentence.

Appeal dismissed.

The appellant did not appear and was not represented.

For the respondent:

The Director of Public Prosecutions, Tanganyika

H. W. Chitepo (Director of Public Prosecutions, Tanganyika)

Re Hoima Ginnars Ltd
[1964] 1 EA 464 (HCU)

Division:	High Court of Uganda at Kampala
Date of judgment:	9 July 1964
Case Number:	3/1964
Before:	Jones J
Sourced by:	LawAfrica

[1] Company – Winding-up – Service on Company – Appointment of provisional liquidator – Ex-parte application by chamber summons – No application to dispense with service of summons on Company – Summons not served – Order made – Whether order made null and void.

Editor's Summary

On the application of a creditor ex-parte by chamber summons for the appointment of a provisional liquidator of the company under s. 238 of the Companies Ordinance, the court made an order appointing the Official Receiver as the provisional liquidator. It was common ground that the summons was not served on the company and that no application was made to dispense with service on the company. On a motion by the company to set aside the order it was submitted that the order was null and void because the creditor had not obtained leave to dispense with service of the summons. The creditor submitted that the motion was misconceived and that the company should have appealed against the order.

Held –

- (i) the omission to apply for dispensation with service of the summons on the company was fatal; accordingly the order appointing the Official Receiver as provisional liquidator was null and void;
- (ii) the order was also null and void because the order extracted and signed by the judge bore no relation to what was sought by the chamber summons or contained in the order as minuted on the

court file;

- (iii) the court had power to set aside the order under its inherent jurisdiction and it was not necessary to appeal against it.

Application allowed.

Cases referred to in judgment

(1) *Re Markanday's Auto Services Ltd.* (Uganda High Court Companies Cause No. 2 of 1964 (unreported)).

(2) *Craig v. Kanssen*, [1943] 1 All E.R. 108. [1943] 1 K.B. 256.

(3) *Re Pritchard*, [1962] 2 All E.R. 846.

(4) *Re Pritchard*, [1963] 1 All E.R. 873.

(5) *Re St. Michael the Archangel Brotherhood*, [1962] 2 All E.R. 609.

Judgment

Jones J: This was a notice of motion by the Hoima Ginners Ltd. seeking to rescind an order made by Sheridan, J. appointing the Official Receiver

provisional liquidator under s. 238 of the Companies Ordinance of the Hoima Ginners Ltd.

There was also a chamber summons filed by the Official Receiver for directions as to how he was to implement the order of Sheridan, J. The hearing of the chamber summons was adjourned into court in order that both matters be dealt with at the same time.

On June 16, 1964 a chamber application was heard by Sheridan, J., ex parte. The petitioners, Messrs. Leslie & Anderson, through their manager Mr. Goodhind applied to the court for an order:

“That the Official Receiver be appointed as Provisional Liquidator of the above named company on the grounds set out in the annexed affidavit of Godfrey Harold Goodhind dated June 15, 1964”.

The ground, in a nutshell, was that the Hoima Ginners Ltd. had defaulted in fulfilling their contracts with Messrs. Leslie & Anderson to deliver coffee to them during the months of April, May and June 1964 and that due to their financial position would not be able to fulfil the remaining part of their contract.

On hearing counsel for the petitioner and reading Mr. Goodhind’s affidavit, Sheridan, J. made the following order which he minuted on the file:

“16/6/64 James for applicants

Order: On reading the affidavit of G. H. Goodhind the Official Receiver is hereby appointed Provisional Liquidator of the Company. Liberty to apply for alternative liquidator.

D. J. Sheridan, J.”

Counsel for the Hoima Ginners Ltd. urged that the order made by Sheridan, J. was bad and therefore ought to be vacated.

He referred to r. 7 (2) of the Companies (Winding Up) Rules 1960 (Laws of Uganda 1960) at p. 507, which states:

“Every application to chambers shall be made by summons, which, unless otherwise ordered, shall be served on every person against whom an order is sought, and shall require the person or persons to whom the summons is addressed to attend at the time and place named in the summons.”

and Faud, J.’s judgment in Companies Cause No. 2 of 1964 in *Re Markanday’s Auto Service Ltd.* (1).

He urged that it was a pre requisite to Sheridan, J. assuming jurisdiction to hear this application ex parte, that an application be made supported by affidavit, and an order be made thereafter after cause shown, that the service of the summons (which this rule said should be served on every person against whom the order is intended to be made) be dispensed with.

There were he said facts of great importance which the learned judge ought to have been seised of before he was asked to make the order. I am not required to go into those facts at this stage, as they are matters which are more proper for the consideration of the court on the hearing of the petition.

Counsel for the creditor from the bar said that he did draw attention of the learned judge to the terms of r. 7 (2). I accept that as true.

He contended that where a matter is urgent, as this was, the appointment of a provisional liquidator could be obtained on an ex parte application. He cited as an authority for that proposition *Palmer’s Company’s Precedents* (17th Edn.) at p. 101.

That is a sound proposition. In my view however, it is not sufficient merely to say to the court that the matter is urgent, to enable it to dispense with the service of a summons on an interested party under these

rules, but there must be an

application before the court to dispense with such service supported by an affidavit on which the learned judge can found his decision, whether to dispense with service or not, and make an order accordingly.

That was not done in this case. Not even the affidavit of Mr. Goodhind stresses the urgency of the matter but it merely states in paras. 12 and 13 “the company is unable to pay its debts. In the circumstances it is just and equitable that the company should be wound up.”

Even if arguments as to the urgency of the petition had been advanced, and the learned judge considered that this was a proper case to dispense with the service of the summons, an order to that effect ought to have been recorded in the file. It was not, nor the fact that Sheridan, J. had even considered the matter. As it was not, I consider it was a fatal omission and not merely an irregularity and with respect I consider Sheridan, J. assumed jurisdiction to hear this chamber application without competence to do so. Consequently the order of Sheridan, J. is in my view null and void and I rescind it.

It was argued that this motion was misconceived and that the applicant should have appealed against it.

No authorities were quoted on either side on this point.

My researches have unearthed an authority which appears to me to be in point.

In *Craig v. Kanssen* (2) the principles of which were applied in *Re Pritchard* (3) in *Re Pritchard* (4) and in *Re St. Michael the Archangel Brotherhood* (5) the court held that:

“A person who is affected by an order of the court which can properly be described as a nullity is entitled *ex debito justitiae* to have it set aside. Failure to serve process where service or process is required renders null and void an order made against the party who should have been served. The court can set aside such an order in its inherent jurisdiction and it is not necessary to appeal from it.

Quaere, whether an appeal from such an order, assuming it to be made in proper time, would be competent”.

I have assumed jurisdiction to deal with this motion on that authority of *Craig v. Kanssen* (2).

If my decision on that point is wrong I am persuaded that the order signed by Sheridan, J. on June 16, 1964, again with the greatest respect, is null and void for this reason:

The chamber summons asked for the appointment of a Provisional Liquidator. Nothing more and nothing less was sought. He gave that without any restrictions of any kind. Yet the order, which was extracted and signed by Sheridan, J. said after appointing the Official Receiver provisional liquidator:

“And the court doth hereby *limit* and restrict the powers of the said provisional liquidator to the following acts that is to say:

- (a) To taking possession of contracts of the above named company relating to the sale, purchase, delivery, or otherwise dealing in Uganda coffee during the year 1964 and to selling, transferring, compounding, negotiating for the disposal of, or otherwise dealing in and with the said contracts.
- (b) To taking possession of, collecting and protecting the assets of the above named company but save as provided for in para. (a) above such assets are not to be distributed or parted with until further notice.

(c) To borrowing money in connection with the powers provided in para. (a) above.”

The order bears no relation to what was sought on the summons or what was given in the order as minuted on the file. It is not a mere clerical error, or an accidental omission but an addition of something which was never sought, or given, by Sheridan, J. in his order.

That being so it does not fall on me to deal with the Official Receivers application for directions.

The application of the Hoima Ginners Limited is allowed, with costs.

Application allowed.

For the applicant:

Parekhji & Co., Kampala

A. G. Mehta and B. W. Dholakia

For the creditor:

Hunter & Greig, Kampala

A. I. James

For the Official Receiver:

The Official Receiver, Uganda

H. D. Pandya (Deputy Official Receiver, Uganda)

Consolidated Agencies Ltd v Bertram Ltd [1964] 1 EA 467 (PC)

Division:	Privy Council
Date of judgment:	1 June 1964
Case Number:	44/1962
Before:	Lord Evershed, Lord Guest and Lord Upjohn
Sourced by:	LawAfrica
Appeal from:	E.A.C.A. Civil Appeal No. 82 of 1961 on appeal from the High Court of Tanganyika – Weston, J.

[1] Limitation of action – Debt – Acknowledgment – Balance sheets showing loan to creditor – Balance sheets signed long after end of financial years to which related – Signature of balance sheets by directors as acknowledgment of existing or past liability – Whether balance sheets constituted acknowledgments of liability within Indian Limitation Act, 1908, s. 19.

Editor's Summary

The respondent sued the appellant for money lent and interest thereon. The appellants' defence was that under the Indian Limitation Act, 1908, the action was time-barred the relevant period being three years. The respondent relied on certain balance sheets of the appellant as acknowledgments of the existence of the loans to keep them alive under s. 19 of the Act and it was common ground that each balance sheet had been signed by the directors sometime after the end of the financial year to which it related. The trial judge held that the action was time barred as the balance sheets being acknowledgments of a liability at the date of the balance sheets were acknowledgments of a past liability and were not acknowledgments of an existing liability. On appeal the Court of Appeal relying on *Jones v. Bellgrove Properties Ltd.*, (6), held that signature of the balance sheets by the directors was an effective acknowledgment of the existence of the debt as at the date of the signature. On further appeal,

Held –

- (i) while signatures on a balance sheet may, in certain circumstances, operate as an acknowledgment of liability the acknowledgment of liability to satisfy s. 19 of the Indian Limitation Act, 1908, must be an acknowledgment of an existing liability;
- (ii) as each balance sheet was signed many months after the end of the year to which the balance sheet related, the acknowledgment was not of an existing

- liability but of a past liability, namely, as at the date to which the balance sheet was made up;
- (iii) the balance sheets were no more than acknowledgments of past liability and as such not sufficient compliance with s. 19.

Appeal allowed.

[**Editorial Note:** Decision of the Court of Appeal reported (1962) E.A. 212 reversed.]

Cases referred to in judgment

- (1) *Perjavenkan Udaya Tevar v. Subramanian Chetti*, [1897] Mad. 239.
- (2) *Kandaswami Reddi v. Suppmal*, [1922] A.I.R. Mad. 104; (1922), 45 Mad. 443.
- (3) *Maniram Seth v. Seth Rupchand* (1906), 33 Cal. 1047.
- (4) *Atlantic and Pacific Fibre Co. v. Importing and Manufacturing Co.*, [1928] Ch. 836.
- (5) *Re The Coliseum (Barrow) Ltd.*, [1930] 2 Ch. 44.
- (6) *Jones v. Bellgrove Properties Ltd.*, [1949] 1 All E.R. 498; [1949] 2 K.B. 700.
- (7) *Howcutt v. Bonser* (1849), 3 Ex. 491.
- (8) *Ledingham v. Bermejo Estancia Co. Ltd.*, [1947] 1 All E.R. 749.
- (9) *Rajah Vizienegaram v. Official Liquidator*, [1952] A.I.R. Mad. 136.

Judgment

Lord Guest: This is an appeal from a decision of the Court of Appeal for Eastern Africa, dated March 29, 1962 allowing an appeal from a judgment of Weston, J., in the High Court of Tanganyika, dated September 19, 1961. The plaintiff, dated April 13, 1961 claimed that the defendant company (the appellant) was indebted to the plaintiff company (the respondent) in the following amounts: – (1) Shs. 349,962/52 being moneys lent and advanced by the respondent to the appellant being repayable on demand: (2) Shs. 6,040/45 being interest at 6 per cent. per annum on Shs. 349,962/52 from January 1, 1961 to April 15 1961, and (3) further interest at 6 per cent. per annum from April 16, 1961 till judgment.

Weston J., found that the respondent's claim was time-barred, but he entered judgment for Shs. 2,430/- conceded by the appellant to be due. The Court of Appeal for Eastern Africa allowed the appeal and allowed judgment for the respondent. On November 21, 1962 the Court of Appeal granted final leave of appeal to Her Majesty in Council.

The appellant appeared by counsel in support of the appeal, but although the respondent had lodged a case, no appearance was made for the respondent at the hearing before the Board.

The only question arising before the Board was whether the respondent's claim was time-barred.

The sum of Shs. 349,962/52 as appeared from two statements of account annexed to the plaintiff were made up as follows:

No. 1 Account showed a cash loan at 6 per cent. per annum of Shs. 85,000/- on March 9, 1951: various payments were made to account between December 15, 1951 and May 15, 1958. Two further cash loans were

advanced in September 1959 amounting to Shs. 2,430/-. These are the sums for which judgment was ex concessis allowed by Weston, J. and about which no question accordingly arises. The outstanding balance at January 1, 1961 on the account was Shs. 23,427/52.

No. 2 Account showed a cash loan at 6 per cent. of Shs. 269,000/- on August 3, 1954. Two sums were paid to account on August 26, 1958 and February 3, 1959 amounting to Shs. 46,030/-. The outstanding balance on this account was Shs. 326,535/-. The addition of these two outstanding balances amounts to Shs. 349,962/52 the sum claimed in item No. 1 of the plaint.

The law governing limitation of actions in Tanganyika is contained in the Indian Limitation Act, 1908, with such amendments thereof as were in force on December 1, 1920, which was applied to Tanganyika by virtue of the Indian Acts (Application) Ordinance of that date (Cap. 2). The Schedule to the Act sets out the periods prescribed for different causes of action, the relevant periods being as follows:

<i>Description of suit</i>	<i>Period of limitation</i>	<i>Time from which period begins to run</i>
57. For money payable for money lent	Three years	When the loan is made.

Section 19 of the Limitation Act provides:

“Where, before the expiration of the period prescribed for a suit or application in respect of any property or right, and acknowledgment of liability in respect of such property or right has been made in writing signed by the party against whom such property or right is claimed, or by some person through whom he derives title or liability, a fresh period of limitation shall be computed from the time when the acknowledgment was so signed.

(2) Where the writing containing the acknowledgment is undated, oral evidence may be given of the time when it was signed; but subject to the provisions of the Indian Evidence Act, 1872, oral evidence of its contents shall not be received.

Explanation I. – For the purposes of this section an acknowledgment may be sufficient though it omits to specify the exact nature of the property or right, or avers that the time for payment, delivery, performance or enjoyment has not yet come, or is accompanied by a refusal to pay, deliver, perform or permit to enjoy, or is coupled with a claim to a set off, or is addressed to a person other than the person entitled to the property or right.

Explanation II. – For the purposes of this section, “signed” means signed either personally or by an agent duly authorised in this behalf.”

Section 20 provides:

“Where interest on a debt or legacy is, before the expiration of the prescribed period, paid as such by the person liable to pay the debt or legacy or by his agent duly authorised in this behalf, or where part of the principal of a debt is, before the expiration of the prescribed period, paid by his debtor or by his agent duly authorised in this behalf, a fresh period of limitation shall be computed from the time when the payment was made:

Provided that, save in the case of a payment of interest made before January 1, 1928, an acknowledgment of the payment appears in the handwriting of, or in a writing signed by, the person making the payment.”

So far as No. 1 Account is concerned the various payments made by the appellant to the respondent between the date of the loan (March 9, 1951) and March 18, 1955 prevented time from running against the respondent.

But from March 18, 1955 the account remained quiescent until May 15, 1958 when a payment to account of Shs. 300/- was made by the appellant to the respondent. But as the debt became time-barred three years after March 18, 1955, that is in March 1958, the payment of Shs. 300/- in May 1958 was ineffective to set time running again, having been made two months after the expiry of the three-year period of limitation.

In regard to No. 2 Account the loan became time-barred on August 3, 1957 three years after it was made. The cash payment of Shs. 20,030/- on August 26, 1958 was made over a year to late to avail the respondent.

The respondent contended in the Courts below that s. 19 (1) of the Indian Limitation Act operated so as to set in train a fresh period of limitation in regard to the sum claimed in the plaint.

In support of this contention the respondent relied on four balance sheets:

- (a) The balance sheet for the appellant company showing the financial position as at December 31, 1954. This contained an entry "Loans – Shs. 412,385" and was signed by W. Dharsee and K. P. Jafrabadwalla as Directors. The evidence disclosed that it must have been signed between October 19, and October 27, 1956 nearly two years later.
- (b) The balance sheet for the appellant company showing the financial position as at December 31, 1955. This contained an entry "Loans – Shs. 277,385" and was signed by the same two Directors according to the evidence between November 6, and November 19, 1957, again nearly two years later.
- (c) The balance sheet for the appellant company showing the financial position as at December 31, 1956. This contained an entry "Loans – Shs. 364,208/78" and was signed by the same two Directors between March 12, 1958 and April 11, 1958 some fifteen months later.
- (d) The balance sheet for the appellant company showing the financial position as at December 31, 1957. This contained an entry "Loans and accrued interest Shs. 365,831/28" and was signed only by W. Dharsee as Director either on April 28 or 29, 1959, some sixteen months later.

Evidence was given by a witness, a partner in the firm of chartered accountants who during the relevant period audited the appellant company's books. This evidence which was accepted by the trial judge was to the effect that the loans to the respondent were included in the general item "Loans" on each of these balance sheets. This finding was not challenged by the appellant in the Court of Appeal or before the Board. This witness also gave the evidence upon which the trial judge fixed the approximate dates when the directors signed the respective balances as already referred to. In passing it may be observed that this witness also testified that the balance sheets were not communicated to any other person than the appellant as he regarded them as confidential.

The trial judge held that the balance sheets were not sufficient acknowledgments to comply with the terms of s. 19 as they were not acknowledgments of an existing liability. He did not consider it necessary to deal with the appellant's other objection to the validity of the acknowledgments, namely that they were not communicated to any person other than the appellant's agents. The Court of Appeal rejected both the appellant's objections to the acknowledgments contained in the balance sheets and held that the signature of the directors was an effective acknowledgment of the existence of the debt as to the date of the signature.

The sole question before the Board is "Whether the balance sheets of the appellant company, signed by its directors in the circumstances. Constituted

acknowledgments of the liability of the appellant within s. 19 of the Indian Limitation Act, 1908". If they are, then the debt is not time-barred. If they are not, then the debt is time-barred and the claim of the respondent must fail.

Their Lordships first proceed to examine s. 19 (1) of the Indian Limitation Act, in order to test the soundness of the decision of the trial judge and the Court of Appeal that the acknowledgment to satisfy the requirements of s. 19 (1) must be of an existing liability. This is a pure question of construction of the relevant section. Their Lordships regret that they have not had the assistance of counsel for the respondent. The section speaks of an "acknowledgment of liability being made in writing signed by the party" and the first period of limitation runs "from the time when the acknowledgment was so signed". This indicates that the punctum temporis is the signing of the acknowledgment and the acknowledgment can only speak to the liability existing at the date of signature. This would be the prima facie view which their Lordships would take the section unassisted by authority. This however is also the construction which has been consistently put on s. 19 by the Indian Courts. Rustomji on the Law of Limitation (5th Edn.) I p. 297 expresses the matter thus:

"To take a demand out of the statute of limitation on the ground of an acknowledgment, the language of the debtor must amount to an unequivocal admission of a subsisting debt, that is subsisting at the time of acknowledgment."

Reference may also be made to the earlier case of *Periavenkan Udaya Tevar v. Subramanian Chetti* (1) and to the recent case of *Kandaswami Reddi v. Suppamal* (2). Their Lordships agree with the views expressed by Weston, J. and Forbes, V.-P. that the case of *Maniram Seth v. Seth Rupchand* (3) decided by the Privy Counsel did not impinge on the principle above stated.

Their Lordships do not doubt that this is the proper construction of s. 19; the next question is whether the balance sheets amount to acknowledgments of an existing liability. In each case the balance sheet was signed many months after the end of the year to which the balance sheet related and the acknowledgment was therefore not of an existing liability but of a past liability as at the date to which the balance sheet was made up. To satisfy s. 19 the liability must exist at the date of the signing of the acknowledgment and the directors' signature on the balance sheets did not refer to a liability at the date of signature but to a liability which existed when the balance sheet was made up. It would be quite unreal to treat the liability shown as existing at the date of signature, as it might have changed and had in the case of one balance sheet been reduced by the time of signature. For example in the balance sheet for the year to December, 31, 1954 "Loans" were shown as Shs. 412,385/- which included the loan to the appellant: but by the time the balance sheet was signed between October 19 and October 27, 1956 the liability on account of loans had already been reduced by Shs. 135,000/- as shown by the balance sheet for the year ending December 31, 1955 and in fact the appellant had paid the respondent Shs. 15,000/- in respect of No. 1 Account during the year 1955.

Their Lordships therefore conclude that Weston, J., was right in deciding that the balance sheets were no more than acknowledgments of past liability and as such not sufficient compliance with s. 19 of the Act.

The Court of Appeal while agreeing with the trial judge that s. 19 required an acknowledgment of an existing liability considered that two English cases which are referred to in the judgment of Forbes, V.-P., forced them to the conclusion that the signatures of the balance sheets by the directors were an effective acknowledgment of the existence of a liability at the date of signature. The English cases support the view that signatures on balance sheets may in certain

circumstances operate as acknowledgments of liability. The real questions are: under what circumstances and to which date do they relate? Until 1928 no question was ever raised in any English case that balance sheets could amount to acknowledgments of liability. But in *Atlantic and Pacific Fibre Co. v. Importing and Manufacturing Co.* (4), Clauson, J., held that the issue of balance sheets constituted a sufficient acknowledgment of the company's indebtedness to the debenture holders. As the debentures were documents under seal, the relevant limitation was contained in s. 5 of the Civil Procedure Act and as this Act did not require that acknowledgment should be given to the creditor or to imply a fresh promise to pay, the learned judge held that the balance sheets were sufficient acknowledgment. No question of the date of acknowledgment was raised.

This case was followed shortly after by *Re The Coliseum (Barrow), Ltd.* (5), before Maugham, J. At [1930] 2 Ch. 44, p. 47 that learned judge observed:

"Accordingly, had the statement been made in the balance sheet that the company owed a specified sum to a shareholder to whom the balance sheet was sent in the usual way that would have amounted, I think, to a sufficient acknowledgment within the authorities."

Atlantic and Pacific Fibre Co. (4), was not referred to. Moreover, the observation quoted was obiter as the decision in the case was that the signatures on the balance sheet containing a note of fees due to directors were not an acknowledgment of liability, as the directors could not authorise the payment of fees to themselves. No question arose in that case as to the date to which the acknowledgment related.

The case most strongly relied on by the Court of Appeal was *Jones v. Bellgrove Properties, Ltd.* (6). In the special circumstances of this case the English Appeal Court held that balance sheets amounted to an acknowledgment of liability under s. 24 (1) of the Limitation Act, 1939, which is not in dissimilar language to the Indian Act. The circumstances were that at the Annual General Meeting of the company on December 31, 1946 when the balance sheets for 1939-44 were produced Mr. Silver a director of the defendant company said in the presence of the plaintiff "These are the accounts for five or six years. Would you care to look at them?" These balance sheets contained an item "Sundry Creditors £7,638.8.10" which included the loan made by the plaintiff. Birkett, J., held that this amounted to an acknowledgment that the liability to the plaintiff existed at the date of the Annual General Meeting. The Court of Appeal affirmed his decision. Lord Goddard, C.J., in giving the judgment of the court followed the *Atlantic Fibre* case (4), and quoted with approval the statement of Maugham, J., in *Coliseum (Barrow), Ltd.* (5), above quoted. Their Lordships consider that this case was rightly decided on its facts. But in their Lordships' view it would not be right to suggest that it can be used as authority for the view that a signature on a balance sheet is in all circumstances an acknowledgment of an existing liability, within the meaning of s. 24 (1) of the Limitation Act, 1939. Nor is it possible to suggest that it is an authority for the view that the signature on the balance sheet is an effective acknowledgment within the 1939 Act of the existence of the debt at the date of signature. No question arose in *Jones v. Bellgrove* (6), as to the precise date to which the acknowledgment related, though Birkett, J., had taken as effective the date of the Annual General Meeting for the reason that this was the date when the liability was acknowledged. In the Court of Appeal this date was accepted without question. So regarded, the case is therefore not inconsistent with the principle that the acknowledgment must be of an existing liability. This principle seems indeed to have been accepted in English law as early as 1849 (see *Howcutt v. Bonser* (7), Preston and Newsome Limitation of Actions (3rd Ed.) p. 240). In the only other case in which

the question of a signature on a balance sheet arose, *Ledingham v. Bermejo Estancia Co., Ltd.* (8), the question was never raised whether the acknowledgment was of an existing liability.

The Court of Appeal for Eastern Africa appear to have based their decision upon the view that *Jones v. Bellgrove Properties* (6), has been followed in India in *Rajah of Vizienegaram v. Official Liquidator* (9), ([1952] A.I.R. Mad. 136 at p. 145). The report of the latter case is very condensed, but the decision in the Lordships' view is based upon a misreading of *Jones v. Bellgrove Properties* (6), if the Indian court treated that case as authority for the view that balance sheets operate as acknowledgments at the date of their signature.

It may well be since the decision in *Atlantic Pacific Fibre* (4), that balance sheets could in certain circumstances amount to acknowledgments of liability, that it has been assumed that the signature on the balance sheet speaks as from the date of the balance sheet, but the question has never been properly considered whether a signature on a balance sheet which must of necessity be made some time after the date to which the balance sheet has been made up can amount to an acknowledgment of an existing liability. There may be cases where it would be proper to assume that the liability persisted up to the date of signature which would then be an acknowledgment of an existing liability, though their Lordships venture to think that, if the effect of the English Limitation Act is the same as that of the Indian Act, some further consideration may have to be given to the general question whether and in what circumstances balance sheets may operate as acknowledgments of debts comprehended therein. In any case their Lordships find it difficult to see in the cases cited any justification for the acknowledgment, consisting of the signature of the balance sheets, being taken to be of the continued existence, at the date of the signature, of the debt stated in the balance sheet.

In the view which their Lordships take of the purported acknowledgment on the balance sheets it is unnecessary to consider the appellant's other objection to the balance sheets, namely that they were not communicated to any person other than the appellant's agent.

Their Lordships have therefore reported to the President of Tanganyika their opinion that this appeal should be allowed and the judgment of the Court of Appeal for Eastern Africa dated March 29, 1962 set aside with costs, and the judgment of Weston, J., dated September 19, 1961 restored, and that the respondent should pay the costs of the hearing before the Board.

Appeal allowed.

For the appellant:

Attenboroughs, London

Bryan O' Donovan, Q.C., P. R. Dastur and E. G. Nugee (of the English Bar)

The respondent did not appear and was not represented.

Joseph Maufi v Republic
[1964] 1 EA 474 (HCT)

Division: High Court of Tanganyika at Dar-es-Salaam

Date of judgment: 20 May 1964

Case Number: 172/1962
Before: Law J
Sourced by: LawAfrica

[1] Criminal law – Trial – Venue – Arrest without warrant – Appearance of accused before court – Offences committed outside jurisdiction of court – Application for transfer of case to court having jurisdiction – Jurisdiction to transfer case when accused appears before court without complaint – Meaning of word “complaint” in Criminal Procedure Code (Cap. 20), s. 77 and s. 88 (T).

Editor’s Summary

The appellant was arrested in Dar-es-Salaam without a warrant on a number of charges for offences alleged to have been committed in another region and was brought before the Dar-es-Salaam District Court and pleaded not guilty. On an application by the prosecutor to transfer the case to the court having jurisdiction in the area where the offences were alleged to have been committed the magistrate purporting to act under s. 77 of the Criminal Procedure Code made the order sought. On appeal it was submitted that the word “complaint” in s. 77 and s. 88 of the Criminal Procedure Code must have the same meaning and that, as the appellant had been arrested without a warrant and had appeared before the magistrate without a complaint having been made, s. 77 had no application and accordingly the order for transfer was made without jurisdiction.

Held – the magistrate was right in holding that under s. 77 he could order the transfer of the case against the appellant to the court having jurisdiction in the area where the offences were alleged to have been committed.

Appeal dismissed.

Judgment

Law J: The appellant is one of two police officers who are charged in the same proceedings with a number of offences against the Prevention of Corruption Ordinance (Cap. 400).

The offences are alleged to have been committed in the Southern Region, but the two men were arrested in Dar-es-Salaam without warrant, and they appeared before the Dar-es-Salaam District Court on April 14, 1964, when they pleaded not guilty to all counts. The prosecutor intimated that an application for the transfer of the case to Lindi or Mtwara would be made in due course. The two accused were then remanded on bail to April 22, when the prosecutor made his application for transfer. Counsel for the first accused, opposed the application, which was however granted by the learned Resident Magistrate, purporting to act under s. 77 of the Criminal Procedure Code. The first accused now appeals against the order of transfer.

Counsel for the appellant submits firstly that s. 77 of the Criminal Procedure Code has no application to a case in which the accused has been arrested without warrant. Subs. (1) of s. 77 reads as follows:

“If upon the hearing of any complaint it appears that the cause of complaint arose out of the limits of the jurisdiction of the court before which such complaint has been brought, the court may, in its discretion direct the case to be transferred to the court having jurisdiction where the cause of complaint arose.”

Counsel for the appellant referred to s. 88 of the Criminal Procedure Code, which deals with the two methods of instituting criminal proceedings. They are:

- (a) the making of a complaint, and
- (b) the bringing of a person who has been arrested without warrant before a magistrate.

Counsel for the appellant submits that the word “complaint” in s. 77 and s. 88 aforesaid must have the same meaning, and that as the appellant did not appear before the magistrate as the result of the making of a complaint s. 77 has no application and the order of transfer appealed against was accordingly made without jurisdiction and must be set aside. Counsel for the appellant submits that, in the case of a person arrested without warrant, only the High Court has power to order a transfer, under s. 80 of the Code.

Counsel for the Republic, has referred me to the definition of the expression “complaint” in s. 22 of the Criminal Procedure Code, which reads:

“ ‘complaint’ means an allegation that some person known or unknown has committed or is guilty of an offence”;

and he submits that this definition is wide enough to cover a formal charge presented against a person who has been arrested without warrant. If counsel for the respondent is right, the peculiar position arises that the word “complaint” has different meanings in s. 77 and s. 88 of the Code. In s. 77 it would include any allegation of criminality, whether made by way of complaint to a magistrate or by formal charge against a person arrested without warrant, and in s. 88 it clearly has the meaning of a particular mode of instituting criminal proceedings as opposed to arrest without warrant. The answer is I think to be found in the opening words of s. 2 of the Code, “in this code, unless the context otherwise requires . . .”. In the context of s. 88, a complaint means one thing and arrest without warrant another. In s. 77, however, the word “complaint” in the context of that section can well, on the face of it, be interpreted in accordance with the definition as including any allegation that a crime has been committed, whether that allegation has been made in a complaint within the restricted meaning of that word in s. 88 or in a formal charge brought against a person who has been arrested without warrant.

Section 77 can well be interpreted by construing the word “complaint” in a broad sense, as including a formal charge; indeed there seems to be no apparent reason why a court’s power to order the transfer of a case should be restricted to cases instituted by way of complaint under s. 88 of the Code, to the exclusion of cases instituted by way of arrest without warrant.

I accordingly hold that the learned Resident Magistrate was right in holding, as he did, that s. 77 of the Code conferred the power to order the transfer of the case against the appellant to the court having jurisdiction in the area where the offences are alleged to have been committed. As regards counsel for the appellant’s point that a transfer should not be ordered after a plea has been taken, I can see no merit in this submission. It would be futile and wasteful to transfer a case in which the accused wishes to plead guilty, and the learned magistrate was fully justified in requiring the appellant to plead before dealing with the application on its merits.

The second main ground of appeal is that the learned magistrate wrongly exercised his discretion in ordering the case to be transferred, because he based his decision on the cost of bringing witnesses to Dar-es-Salaam by air, to the exclusion of road transport. The learned magistrate had been informed, by the prosecutor, that road travel was impracticable at the time. Counsel for the appellant argued that the state of the roads might well improve.

The learned magistrate clearly had the possibility of road travel in mind, when coming to his decision. I am unable to say that he wrongly exercised his discretion in ordering the case to be transferred to Lindi or Mtwara. It follows from what I have said that in my opinion this appeal fails and must be dismissed, and I order accordingly.

Appeal dismissed.

For the appellant:

K. A. Master Q.C. and T. C. Kanabar, Dar-es-Salaam

For the respondent:

The Director of Public Prosecutions, Tanganyika

A. M. Troup (Senior State Attorney, Tanganyika)

Haza Abdulgafur v Republic
[1964] 1 EA 476 (CAN)

Division:	Court of Appeal at Nairobi
Date of judgment:	2 July 1964
Case Number:	41/1964
Before:	Sir Samuel Quashie-Idun P, Sir Daniel Crawshaw and Crabbe JJA
Sourced by:	LawAfrica
Appeal from	The High Court of Tanganyika – Weston, J.)

[1] Criminal law – Evidence – Admissibility – Dying declaration – Admissibility – Incomplete dying declaration – Deceased becoming unconscious before statement completed.

Editor's Summary

The appellant was convicted of murdering his wife. At the trial the judge admitted a dying statement made by the wife which was incomplete as the wife became unconscious while making the statement and never recovered. On appeal it was submitted that the judge had erred in admitting the statement in evidence.

Held –

- (i) the dying statement of the wife was complete in that it completely covered the relevant incidents and was accordingly admissible in evidence. *Waugh v. R.* (1), distinguished.
- (ii) the judge was justified in finding that the medical evidence was strong corroboration of the

statement, if not in itself conclusive.

Appeal dismissed.

Cases referred to in judgment

(1) *Waugh v. R.*, [1950] A.C. 203.

Judgment

Sir Samuel Quashie-Idun P, read the following judgment of the court: We are of the opinion that the facts of the case in *Waugh v. R.* (1), to which we have been referred are distinguishable from the facts in the present case and that the statement of the deceased was complete in that it completely covered the incidents and was properly admitted in evidence. We think that the trial judge was justified in finding that the medical evidence was strong corroboration of the statement, if not in itself conclusive, as he did find. We therefore dismiss the appeal.

Appeal dismissed.

For the appellant:

Fraser Murray, Roden & Co., Dar-es-Salaam

A. A. Lakha

For the respondent:

The Attorney General, Tanganyika

A. M. Troup (Senior State Attorney, Tanganyika)

Abdalla Katwe and others v Uganda [1964] 1 EA 477 (HCU)

Division:	High Court of Uganda at Kampala
Date of judgment:	15 June 1964
Case Number:	27, 28, 29, 30 and 31/1964
Before:	Bennett J
Sourced by:	LawAfrica

[1] Criminal law – Evidence – Admissibility – Character of accused – Imputation on character of witness for prosecution – Allegation that evidence fabricated – Whether cross-examination of accused permissible as to previous convictions.

Editor's Summary

The appellants were charged with conspiracy to commit robbery. The evidence was that, acting on

information received, an inspector of police, with five other officers, all in plain clothes, went in his car to patrol a road and saw a car 150 yards in front of him move so as to block his way. Five Africans armed with stones descended and came towards his car; when the officers emerged, the Africans withdrew but were arrested and stones were found in their car and the number plates were greased and smeared with sand. At the trial counsel for the appellants in cross-examination suggested to the inspector that he had fabricated the evidence. Later the prosecuting officer applied for leave to cross-examine the fifth appellant on his previous convictions and the magistrate ruled that the appellants had put their characters in issue and that the prosecutor was entitled to cross-examine the fifth appellant. Both the third and fifth appellants admitted previous convictions and the magistrate convicted all the appellants. On appeal the main grounds of appeal were that the magistrate had erred in admitting evidence of the bad character of the third and fifth appellants under s. 52 of the Evidence Ordinance and that counsel for the appellants was entitled to make imputations against the character of the inspector at the trial without the appellants being cross-examined on their previous criminal history because it was an integral part of the defence without which the appellants could not have put their case before the magistrate fairly and squarely.

Held – in suggesting to the inspector that he had planted stones in the appellants' car and had obscured the number plates with grease and sand, counsel for the appellants went beyond what was necessary for the proper and fair presentation of his clients' case before the court; accordingly the magistrate had properly exercised his discretion in admitting evidence of the bad character of the third and fifth appellants.

Appeals dismissed.

Cases referred to in judgment:

- (1) *Royston v. R.* (1953), 20 E.A.C.A. 147.
- (2) *R. v. Jones*, 17 Cr. App. R. 117.

Judgment

Bennett J: The five appellants were convicted by the District Court of Mengo of conspiracy to commit robbery contrary to ss. 272 and 273 of the Penal Code, and sentenced to terms of imprisonment. They appeal against their convictions and sentences.

The evidence upon which the five appellants were convicted was circumstantial, and is summarised in the following passage from the judgment of the learned magistrate:

“As a result of information received, Insp. Kasoro of the Flying Squad, Kampala C.I.D., proceeded, in his own private motor car, with five other

police officers, all in plain clothes (including the Inspector) to patrol a stretch of the road between Mpenja and Kanoni village in County Gomba, on October 14, 1963.

At about midday, the Inspector, who was driving his own car down a gentle slope three miles out of Mpenja, noticed a Peugeot at a distance of some 150 yards in front of him. That car started to move towards him, and on approaching him, blocked his way. Five Africans descended, armed with stones, and came towards his car. In the meantime his own officers, armed with batons, descended from his car. The five Africans withdrew to their car, and the Inspector rushed towards the driver, A.1., pulling him out and taking the car keys whilst the other officers surrounded the car and arrested the occupants A.2.-A.5. and a sixth who later escaped. Thirteen stones the size of a fist were found in the car. The plate numbers of the car occupied by the accused persons were greased and smeared with sand to make the reading thereof difficult or impossible. The five accused were taken to Tandoro Police Post, a Kabaka's Government Police Post, where they were kept overnight. The motor car which the accused persons occupied was also taken there with the stones."

The defence to the charge was that Inspector Kasoro and the other police officers who gave evidence for the prosecution were not witnesses of truth, and that the charge against the appellants was false.

Counsel, who appeared for all five appellants in the court below, also appeared on their behalf in this court. He attacked the convictions on four main grounds.

The first was that the learned magistrate had erred in admitting evidence of the bad character of the 3rd and 5th appellants, under s. 52 of the Evidence Ordinance. Counsel for the appellants contended that not only did this wrongful admission of evidence prejudice the trial of the 3rd and 5th appellants themselves, but that the other appellants had been prejudiced by the wrongful admission of evidence of the bad character of their co-accused.

That counsel did make imputations against the character of Inspector Kasoso on the first day of the trial is plain from the record of the proceedings. In cross-examining Inspector Kasoro, counsel for the appellants put this question: "I put it to you that you have created this grease, fabricated it in fact, then dishonestly, framed them up. I further put it to you that you warned their car to stop, and it stopped, and having found nothing you planted the stones, and put the grease and sand?"

After the question was put, the learned magistrate warned counsel for the appellants that he was making serious allegations against the character of the witnesses, and that this might put in issue the character of his clients. Counsel for the appellants insisted on putting the question, and an answer was given by the witness. After the 5th appellant had given evidence-in-chief, the prosecuting police officer asked the court's leave to cross-examine him on his previous record. Counsel for the appellants objected and the matter was adjourned for argument. At the adjourned hearing the matter was fully argued, and the learned magistrate, in a reserved ruling, held that the appellants had put their character in issue and that the prosecution were entitled to cross-examine the 5th appellant on his record. Both the 3rd and 5th appellants admitted previous convictions during cross-examination.

Counsel for the appellants contended in this court, as he contended in the court below, that it was an integral part of the defence case that the prosecution evidence was fabricated, that the stones which were found in the appellant's car had been planted there by the police, and that the police themselves had obscured the number plates of the appellant's car. Mr. Haque relied on *Royston v. R.* (1). In that case it was held that s. 159 of the Criminal Procedure Code of Kenya

being textually the same as s. 13 of the Criminal Evidence Acts, 1898 (of England), English case law should be followed, and that where imputations involving the character of prosecution witnesses are an integral part of the defence without which the accused cannot put his case before the jury fairly and squarely, he cannot be cross-examined on his previous criminal history.

Although s. 52 of the Evidence Ordinance of Uganda is not textually the same as s. 159 of the Kenya Criminal Procedure Code, it is in *pari materia*, and the decision in *Royston's* case (1), must be regarded as governing the construction of s. 52 of the Evidence Ordinance.

Was the question put by counsel for the appellants to Inspector Kasoro and the imputations contained in that question necessary to enable the accused's defence to be put fairly and squarely before the court?

It was clearly necessary for counsel for the appellants to suggest to the Inspector that his evidence was untrue. Such a suggestion would not in my judgment entitle the prosecution to cross-examine the accused or any of them as to their character. It seems to me, however, that in suggesting to Inspector Kasoro that he had planted the stones in the appellants' car and that he had obscured the number plates with grease and sand, counsel for the appellants was going beyond what was necessary to put his client's case before the court. None of the appellants, when giving evidence, said that the police had planted stones in the appellants' car or that the police had obscured the number plates of the car. The 3rd and 5th appellants testified that there were no stones in the car, and that its number plates were not obscured. I am therefore of the opinion that while counsel for the appellants would have been perfectly justified in suggesting to Inspector Kasoro that he was giving false evidence when he said that he had found stones in the appellants' car, and when he said that the number plates were obscured with grease and sand, counsel for the appellants was not entitled to suggest to the Inspector that he himself had planted stones in the car or that he himself had obscured the number plates. In making these two imputations counsel for the appellants went beyond what was necessary for the proper and fair presentation of his clients' case. I am fortified in this view by the decision of the Court of Criminal Appeal in *R. v. Jones* (2). In that case it was held that an accused who alleged that a police inspector had fabricated evidence of a statement alleged to have been made by the accused to the Inspector and who alleged the police had obtained successive remands in order to manufacture evidence, was properly cross-examined as to his own character. To quote from the judgment of the court:

"A clear line is drawn between words which are an emphatic denial of the evidence and words which attack the conduct or character of the witness. Applying that ratio decidendi to the present case, it appears to this court that it comes within the line of saying what is forbidden. It was one thing for the appellant to deny that he had made the confession; but it is another thing to say that the whole thing was a deliberate and elaborate concoction on the part of the inspector; that seems to be an attack on the character of the witness."

I therefore hold that the learned magistrate properly exercised his discretion in admitting evidence of the bad character of the 3rd and 5th appellants.

Counsel for the appellants' second ground of attack was that even if the prosecution evidence were to be taken at its face value it did not establish that the appellants were parties to a conspiracy to rob. He suggested that one or more of the appellants might have had a private grudge against Inspector Kasoro which could account for the hold-up. It was never suggested to Inspector Kasoro while he was in the witness box that any one of the appellants had a grudge against

him, nor did the appellants give evidence of any ill will. If motives of revenge are excluded, I consider that the evidence did lead to an inescapable inference that the purpose of the hold-up was robbery. Quite plainly the hold-up had been planned in advance and the conduct of the occupants of the car indicated that they were all parties to a common design. I consider that on the evidence they were correctly charged with conspiracy to commit robbery.

Counsel for the appellants' third point was that the learned magistrate had failed to give sufficient consideration to the inherent improbability of the prosecution case, in the light of an answer given by Det. Constable Ebong in cross-examination. The answer was:

"Yes, Inspector Kasoro told me that information was received that an Asian was to be waylaid in that area."

It is contended that if the information in the possession of the police was to the effect that an Asian was to be waylaid it was a most extraordinary coincidence that the appellants should have waylaid a car in which there was no Asian. Ebong's answer was hearsay, and was not admissible in evidence. All that Inspector Kasoro said about the matter was:

"The information I received was to the effect that an offence was planned."

Considering the evidence as a whole I do not consider that the prosecution case was so improbable as to be unworthy of belief.

Counsel for the appellants' last point was that there were so many discrepancies in the evidence of the police witnesses that it was unsafe to rely upon their evidence, since when, as in the instant case, the defence is that the prosecution case has been concocted the slightest discrepancy is material.

The learned magistrate gave the most careful consideration in his judgment to the discrepancies, and did not consider any of them of sufficient importance to raise a doubt as to the credibility of the prosecution witnesses. I am in entire agreement with his findings on this aspect of the case.

In my judgment, all the appellants were properly convicted. Having regard to the prevalence of highway robbery in Uganda I do not consider that the sentences were excessive.

All the appeals are dismissed.

Appeals dismissed.

For the appellants:

Haque & Gopal, Kampala

Z. Haque

For the respondent:

The Director of Public Prosecutions, Uganda

P. K. Mpungo (State Attorney, Uganda)

Ahmedi Ali Dharamsi Sumar v Republic
[1964] 1 EA 481 (CAD)

Division: Court of Appeal at Dar-es-Salaam

Date of judgment: 17 September 1964
Case Number: 75/1964
Before: Sir Daniel Crawshaw, Sir Clement De Lestang and Duffus JJA
Sourced by: LawAfrica
Appeal from The High Court of Tanganyika – Williams, J.

[1] *Criminal law – New trial – Principles on which retrial should be ordered.*

Editor's Summary

The appellant was convicted by a magistrate of an offence under the Prevention of Corruption Ordinance. The evidence was that the appellant gave one, O. through one, J., Shs. 800/- in order to induce O., as Deputy Chairman of the Transport Licensing Authority, to agree to his substituting a licence for a new vehicle for the existing licence of an old vehicle. The prosecution case depended on the evidence of O. and J. both of whom stated definitely that each of them had seen the appellant at different times on September 4. The magistrate rejected O.'s evidence that he had seen the appellant on September 4, but went on to accept the prosecution case and found the appellant guilty. On appeal to the High Court the judge held that the magistrate, having rejected a material portion of O.'s evidence, had failed to direct his mind to the evidence of J. about the meeting on September 4. He accordingly allowed the appeal and ordered a re-trial. The appellant appealed against the order for re-trial.

Held –

- (i) whether an order for re-trial should be made depends on the particular facts and circumstances of each case but should only be made where the interests of justice require it and where it is not likely to cause an injustice to an accused person;
- (ii) there was ample evidence on which to convict the appellant if the prosecution witnesses were believed, but the magistrate failed to test the evidence of J. in the light of his rejection of part of the evidence of O.; since on a re-trial O. and J. might give different evidence on the very points on which the magistrate had failed to direct himself, it would not be right to cause the appellant to stand another trial.

Appeal allowed. Order for re-trial set aside.

Cases referred to in judgment:

- (1) *Salim Muhsin v. Salim Bin Mohamed and Others* (1950), 17 E.A.C.A. 128.
- (2) *R. v. Dossani* (1946), 13 E.A.C.A. 150.
- (3) *Pascal Clement Braganza v. R.*, [1957] E.A. 152 (C.A.).

The following judgments were read:

Duffus JA: The appellant was convicted, in the District Court of Dares-Salaam for an offence under the Prevention of Corruption Ordinance (Cap. 400) and sentenced to two years' imprisonment. The appellant appealed to the High Court of Tanganyika and that court allowed the appeal and acting under the

provisions of s. 319(1)(a)(i) of the Criminal Procedure Code ordered that the appellant be retried before a court of competent jurisdiction. The appellant now appeals to this court against the order for re-trial.

The charge is that the appellant gave the first prosecution witness, Otieno, through the third prosecution witness, Jetha, Shs. 800/- in order to induce Mr. Otieno, as the Deputy Chairman of the Transport Licensing Authority, to agree to his substituting a licence for a new vehicle for the existing licence of an old vehicle. It is common ground that the prosecution's case depends on the evidence of these two witnesses, Otieno and Jetha. Both witnesses stated definitely that they had each seen the appellant at different times on September 4. The witness, Jetha, stated that the appellant then gave him the envelope which contained the alleged bribe of Shs. 800/- to give to the witness, Otieno, and that he arranged for an interview between the appellant and Otieno. He was not present at this interview but later in his evidence he states that Mr. Otieno had indicated that he was agreeable to the substitution of the vehicles after the interview on the 4th. In his findings the magistrate rejected that portion of Otieno's evidence, stating that he had seen the appellant on the 4th, but went on to accept the prosecution's case and found the appellant guilty.

On the appeal to the High Court the learned judge found that the magistrate, having rejected a material portion of the first prosecution witness's evidence, had failed to direct his mind as to the evidence of the third prosecution witness about this meeting on September 4. He said:

"If the learned magistrate had given full consideration to these two material and relevant matters concerning two witnesses upon whose evidence the case for the Republic rests it is not wholly unlikely that he would have come to a different conclusion."

He accordingly allowed the appeal and ordered a re-trial. We would observe that he was not quite right in saying that the magistrate gave no reason for his rejection of P.W.1's evidence, for we understand the magistrate to mean that the nature of the conversation between the first and third prosecution witnesses on September 6, indicated that the matters had not been discussed by them before. If there was repetition on the 6th of what was alleged to have been said on the 4th, we should have thought that it would readily have been attributable to the desire of P.W.1 to get it on to the tape recorder.

Learned counsel for the appellant relied largely on the decision of this court in *Salim Muhsin v. Salim Bin Mohamed and Others* (1). Unfortunately this appeal was badly reported by the learned editor of the Reports as instead of reproducing the excerpts from the judgment stating the reasons for the court refusing to grant a re-trial he quoted an excerpt which had no relation to the order for re-trial as set out in the headnote of the case. We have had recourse to the original judgment in that case (Criminal Appeal No. 63 of 1950, judgment of 26.4.1950). In that judgment this court dealt fully with the various cases where an order for re-trial should be made. That case dealt with the powers of the High Court of Uganda to order a re-trial under s. 314(1)(a)(i) of the Criminal Procedure Code of Uganda but those provisions are similar to s. 319(1)(a)(i) of the Criminal Procedure Code of Tanganyika under which the re-trial was ordered in this case. We would here set out extracts from the relevant portion of that judgment which dealt with the order for re-trial, and which would in our view apply to the present case – we quote:

"The terms of that section appear to give the High Court on appeal unlimited discretion as to ordering a re-trial but like all judicial discretion must be exercised in a judicial manner and there is a considerable body of authority as to what is and what is not a proper judicial exercise of this discretion.

This matter has been the subject of judicial decision in India where s. 423 (1)(b)(2) of the Indian Criminal Procedure Code is in the same terms as the Uganda section on this point. By the Indian decisions it is well settled that a re-trial should not be ordered where the conviction is set aside because the evidence was insufficient to establish the charges, or for the purpose of enabling the prosecution to fill up gaps left in their evidence at the first trial. In general the Courts in India order re-trial only where the original trial was illegal or defective. (See Sohoni's Code of Criminal Procedure (13th Edn.), pp. 898 & seqq.) The general trend of these Indian decisions is in harmony with the established principle of English Law, 'Nemo bis vexari debet pro eadem causa'.

There are decisions of this court to the same general effect as the Indian decisions. These cases are as follows:

<i>R. v. Dossani</i>	13 E.A.C.A. 150
<i>R. v. Kua</i>	14 E.A.C.A. 118
<i>R. v. Suke</i>	14 E.A.C.A. 134
<i>R. v. Dinu</i>	14 E.A.C.A. 136

.....

The learned Chief Justice then dealt with the question of the re-trial. On this point the judgment proceeds as follows:

'It has been through no fault of the prosecution that a re-trial has been necessitated. I accordingly order a re-trial by the same court.'

With respect to the learned Chief Justice it would appear that at this stage of his Lordship's judgment a wrong test was applied. It is true that where a conviction is vitiated by a gap in the evidence or other defect for which the prosecution is to blame, the court will not order a re-trial. But where a conviction is vitiated by a mistake of the trial court for which the prosecution is *not* to blame it does not in our view follow that a re-trial should be ordered. Clearly, of course, each case must depend on its particular facts and circumstances but in this present case where the conviction was quashed because the magistrate had misdirected himself as to the onus of proof, it would be most unjust to compel the accused to stand another trial. The magistrate's error may not have been the fault of the prosecution but surely it is a more important consideration that it was not the fault of the accused.

On principle and on the authorities we do not consider that this was a case where the order of a re-trial was justified."

We were also referred to the judgment of this court in the case of *R. v. Dossani* (2). This case was considered by the court in arriving at the decision in the *Salim Muhsin* (1) case. We were also referred to the judgment in *Pascal Clement Braganza v. R.* (3). In this judgment the court accepted the principle that re-trial should not be ordered unless the court was of opinion that on a proper consideration of the admissible or potentially admissible evidence a conviction might result, but the court did not disagree with the principles as laid down in the *Salim Muhsin* case. Each case must depend on the particular facts and circumstances of that case but an order for re-trial should only be made where the interests of justice require it, and should not be ordered where it is likely to cause an injustice to an accused person.

We agree with the learned judge that there was ample evidence on which to convict the appellant if the prosecution witnesses were believed, but the magistrate failed to test the reliability of the evidence of Jetha in the light of his rejection of that part of Otieno's evidence to which reference has already been made. It is possible that on a re-trial these two prosecution witnesses might now give different evidence on the very points on which the magistrate failed to direct

himself and we are of the view that it would not be right in the circumstances of this case to cause the appellant to stand another trial.

The appeal is allowed and the order for re-trial set aside.

Appeal allowed. Order for re-trial set aside.

For the appellant:

Sayani & Co., Dar-es-Salaam

Bryan O'Donovan, Q.C. and N. R. D. Sayani

For the respondent:

The Attorney General, Tanganyika

O. T. Hamlyn (State Attorney, Tanganyika)

Sardar Mohamed Maherally Shroff v The Commissioner of Income Tax [1964] 1 EA 484 (PC)

Division:	Privy Council
Date of judgment:	7 July 1964
Case Number:	11/1963
Before:	Viscount Radcliffe, Lord Hodson and Lord Donovan
Sourced by:	LawAfrica
Appeal from:	E.A.C.A. Civil Appeal No. 15 of 1962 on appeal from the Supreme Court of Kenya – Madan, J.

[1] *Income tax – Appeal – Extension of time – Inability to file appeals through sickness alleged – Unreasonable delay – Non-compliance with Income Tax (Appeal to the Kenya Supreme Court) Rules, 1959, r. 3.*

Editor's Summary

The appellant applied under r. 3 of the Income Tax (Appeal to the Kenya Supreme Court) Rules, 1959, for an extension of time to lodge appeals against two assessments made upon him by the respondent. The application for extension was made on October 27, 1961, which was two days after the prescribed time for filing the appeals had expired. The affidavit filed in support of the application averred, *inter alia*, that the appellant had on about September 12, 1961 experienced a severe attack of hyper-tension and was thus unable to instruct his advocate to proceed with his intended appeals and that he became fit to resume work on October 12, 1961. The judge held that the appellant was not prevented by sickness from presenting his appeals as the appellant was in a position to instruct his advocate for several weeks before

he was taken ill. His appeal to the Court of Appeal was also dismissed and on further appeal the principal argument was that the judge and the Court of Appeal were wrong in inferring that the appellant was not prevented by sickness from presenting his appeals and accordingly they were also wrong in refusing to extend time.

Held –

- (i) taking the view of the evidence, including the doctor's medical certificate, most favourable to the appellant, it was impossible to say that the conclusion reached by the judge and the Court of Appeal was wrong.
- (ii) there is no limit to the power of the court to consider any reasonable appeal under r. 3 of the Income Tax (Appeal to the Kenya Supreme Court) Rules, 1959.

Appeal dismissed.

Case referred to in judgment:

- (1) *Vincenzini v. Regional Commissioner of Income Tax*, [1963] A.C. 459; [1963] E.A. 162 (P.C.).

Judgment

Lord Hodson: The appellant was assessed to income tax by the Commissioner of Income Tax for East Africa for the years of income being the calendar years 1960 and 1961 in the estimated amounts of £55,000 for 1960 and £10,000 for 1961. These assessments were made under the authority of s. 102 (3) of the East African Income Tax (Management) Act, 1958 (hereinafter referred to as the Act) which, in a case where a person has not delivered a return of income, allows the Commissioner of Income Tax to determine, according to the best of his judgment, the amount of that person's income, and assess him accordingly. The notices of the foregoing assessments describe the source of the appellant's income as being "Trade, Profession, etc.". The trade or profession is not described, and there is, apparently, no obligation to do so. From a document filed by the appellant and entitled "Statement of Facts" it would appear that he is a citizen of Pakistan, and that he went to East Africa from Bombay in June, 1960 to investigate the possibility of capital investment in East Africa. The same statement admits a number of transactions on the part of the appellant in East Africa such as the sale of foreign currency notes, the sale of some sarees, and the receipt of deposits in respect of a proposed property transaction, of which deposits a substantial sum was refunded and the balance treated as a loan to the appellant. From the sale of foreign currency notes, according to the same statement, the appellant made no profit, and from the other transactions a profit of some 1,200 shillings only – a sum not sufficient to render him liable to income tax when allowances are taken into account. It seems obvious that the respondent had different views about the appellant's income in East Africa – hence the estimated assessments.

The appellant objected to the assessments by notice in writing to the respondent, pursuant to the terms of s. 109 of the Act, but the respondent refused to amend the assessments, and caused a notice confirming them to be served on the appellant. Thereupon, the appellant, as he was entitled to do under s. 111(1)(a) of the Act, appealed to the local committee having jurisdiction to hear such an appeal pursuant to s. 108 of the Act. On July 28, 1961 the clerk to such local committee issued a notice to the appellant informing him that his appeal was not upheld.

Under s. 111 of the Act the appellant had a right to appeal from the local committee's decision to a judge upon giving notice of appeal in writing to the respondent within 45 days. This right of appeal was duly exercised by the appellant by giving a written notice to the respondent on September 8, 1961. Section 117 of the Act gives the appropriate authority the right to make rules governing appeals under Part 8 of the Act (which includes s. 111); and under s. 117 (2) the appropriate authority for Kenya is the Rules Committee established under s. 81 of the Civil Procedure Ordinance of Kenya. The rules made pursuant to this power are entitled "Income Tax (Appeal to the Kenya Supreme Court) Rules, 1959"; and r. 3 thereof prescribes that every appeal to a judge under the Act shall be preferred in the form of a memorandum of appeal and shall be presented to the registrar within 75 days after the date of the service upon the appellant of (in the present case) the notice of the decision of the local committee. That notice, it will be recalled, was dated July 28, 1961. By s. 145 (3) of the Act service of this notice was deemed to have been effected at the latest 14 days after the date of posting, i.e. on August 11, 1961. The period of 75 days for serving a memorandum of appeal therefore expired on October 25, 1961. The appellant did not file his memoranda of appeal until October 27, 1961, and was thus two days out of time.

By notice of motion taken out on that day the appellant applied to a judge, as under the Act he was entitled to do, to enlarge the time for filing memoranda of appeal against the assessments in both cases (1960 and 1961).

The applications were made in reliance upon the proviso to r. 3 which reads as follows:

“Provided that, where a judge is satisfied that, owing to absence from the Colony, sickness, or other reasonable cause, the appellant was prevented from presenting such memorandum of appeal within such period and that there has been no unreasonable delay on his part, the judge may extend the period within which such memorandum of appeal shall be presented.”

The applications were supported by affidavits of the appellant in which he swore that he had been suffering from high blood pressure for some years and that on or about September 12, 1961 he received a severe attack of hypertension, as a result of which he was unable to instruct his advocate to proceed with his intended appeal. The affidavits also stated that during his illness the appellant had been treated by a Dr. Bowry who advised him that he was fit to resume work on October 12, 1961. Dr. Bowry's certificate of that date was exhibited stating that the appellant had been suffering from hypertension since September 12, 1961 and was fit to resume his duties.

On November 27, 1961 Madan, J., dismissed both the applications. He held that the appellant was not prevented by sickness from presenting his memoranda of appeal and pointed out that he was in a position to instruct his advocate from October 12 until October 25, and had also had at his disposal the earlier period before he was taken ill, i.e. from August 11 until September 12. The judge also held that there had been unreasonable delay on the part of the appellant having regard to the period of fitness after his recovery, expressing the opinion that the memorandum of appeal was not so taxing or legally complex that it could not have been finalised within the statutory period of 75 days. Accordingly by order of December 6, 1961 the applications were dismissed. The appellant appealed to the Court of Appeal. The appeal was heard on October 18, 1962 and was dismissed. The Vice-President with whom the other members of the court agreed said that the judge was not satisfied that the appellant was prevented from presenting the appeal and that the medical certificate did not show that he could not give instructions. The Vice-President added that he could not say that the judge was wrong.

The point was taken before the judge and also in the written case submitted to their Lordships that the appellant must fail because he did not apply for an extension of time within the prescribed period of 75 days, which, as the judge at the hearing before him pointed out, would lead to odd results; but this point was abandoned by the respondent during the course of the hearing before their Lordships.

The principal ground of appeal was that the courts of East Africa were wrong in drawing the inference against the appellant that he was not prevented by sickness from presenting his appeals and accordingly it was argued that they were wrong in refusing to extend the period.

On this matter, taking the view of the evidence including the doctor's medical certificate, most favourable to the appellant, it is impossible to say that the conclusion reached was wrong. The criticism was advanced that the judge was wrong in emphasising the relative simplicity of the memoranda of appeal since other documents, including a statement of facts, which would have to be drawn up on information supplied by the appellant were, required to be lodged at the same time. The statements of fact in each case were before the judge and even if

they were not specifically referred to in his judgment they must have been considered by him and in any event do not affect the validity of his comment. The appellant had long since consulted a firm of accountants through whom his appeals to the local committee at Nairobi had been lodged, and on their advice had subsequently, before the attack of hypertension referred to, instructed his advocate in these matters. Their Lordships therefore reject the argument based on the evidence relating to the appellant's period of sickness.

So far as unreasonable delay is concerned it was scarcely contended that the only relevant delay must be that which occurred in the two days following the expiration of the 75 day period; but it was submitted that taking into account the whole period of 75 days plus 2 days it ought not to be held that the delay was unreasonable. Their Lordships on a review of the facts disclosed by the evidence do not accept this submission.

Reference was made to r. 21 of the Income Tax (Appeal to the Kenya Supreme Court) Rules, 1959 which reads:

"The rules determining procedure in civil suits before the court in so far as such rules relate to . . . the enlargement of time shall, to the extent to which such rules are not inconsistent with the Act or these Rules, apply to an appeal to a judge under the Act as if such appeal were a civil suit . . ."

Hence reliance was placed on Order XLIX, r. 5 of the Civil Procedure (Revised) Rules, 1948 which reads as follows:

"Where a limited time has been fixed for doing an act or taking any proceedings under these Rules, or by summary notice or by order of the court, the court shall have power to enlarge such time upon such terms (if any) as the justice of the case may require . . .".

It was urged that the East African court was wrong in not taking into account the terms of Order XLIX, r. 5 in considering the appellant's applications. There are two answers to this. In the first place r. 3 is complete in itself in laying down the grounds upon which an extension of time may be granted, and there is no room for the superimposition of Order XLIX, r. 5 which would be inconsistent if it sought to enlarge the range of discretion. In the second place, reliance on Order XLIX, r. 5 is of no assistance to the appellant in any event. Under Order XLIX, r. 5 the court has power to enlarge time upon such terms (if any) as the justice of the case may require. Rule 3 is in equally wide terms containing as it does the words "or other reasonable cause" so that there is no limit to the power of the court to consider any reasonable excuse put forward by an appellant. In this case the appellant was not in any way limited to the ground put forward, namely his sickness.

Finally it was argued that it had been pointed out by their Lordships in the case of *Vincenzini v. Regional Commissioner of Income Tax* (1) that the rules are procedural and are to be construed subject to the overriding consideration that the right of appeal provided by the Statute survives.

It is true that there is nothing in the rules providing that appeals shall be dismissed on failure to comply with r. 3. Rules which provide for dismissal of appeals in the event of the appellant failing to appear at the hearing (r. 11) and failure to deposit costs (r. 12) may be contrasted, but the question of the survival of the right of appeal is not under consideration and it is not necessary to determine whether the right has lapsed or not. It has been conceded for the purposes of these appeals that the appellant is out of time, on the assumption that notices of the decision of the local committee were deemed to have been served on the appellant at the latest 14 days after posting, i.e. on August 11, 1961. It is on the footing that the 75 days runs from this date that the appellant has applied for

an extension of his time but no application has been made as yet for the formal dismissal of the appeal.

The only question for determination is whether or not the court of East Africa were wrong in dismissing the appellant's applications made under the provisions of r. 3.

Their Lordships are of opinion that there is no ground upon which these decisions should be reversed and will accordingly humbly advise Her Majesty that this appeal should be dismissed. The appellant must pay the costs of the appeal.

Appeal dismissed.

For the appellant:

Merriman, White & Co., London

D. Miller, Q.C. and *R. Rowlands* (both of the English bar)

For the respondent:

Charles Russell & Co., London

H. H. Monroe, Q.C. (of the English bar) and *A. K. Akiwume* (Legal Secretary, East African Common Services Organization)

Msaro Galime v Republic [1964] 1 EA 488 (CAD)

Division:	Court of Appeal at Dar-es-Salaam
Date of judgment:	16 September 1964
Case Number:	63/1964
Before:	Sir Daniel Crawshaw, Sir Clement De Lestang and Duffus JJA
Sourced by:	LawAfrica

[1] Criminal law – Trial – Assessors – Opinion of assessors not taken on general issue of guilt or innocence – Assessors asked specific questions – Provocation not put to assessors – Opinions of assessors equivocal as to guilt.

Editor's Summary

The appellant was convicted of murder. At his trial the judge asked the assessors to answer two specific questions but failed to obtain their opinion upon the general issue of the guilt or innocence of the appellant. The appellant's evidence was that he was attacked by the deceased but the judge disbelieved him and did not, therefore, consider the question of provocation. The opinions of the assessors upon the questions put to them were equivocal as to the guilt of the appellant. On appeal,

Held – if the question of provocation had been put to the assessors, their opinion might have been that there was provocation reducing the offence to manslaughter and the judge might have accepted their advice; accordingly the appellant must be given the benefit of that uncertainty; accordingly for the conviction for murder a conviction of manslaughter would be substituted.

Appeal allowed. Conviction of murder set aside. Conviction of manslaughter substituted.

Case referred to in judgment:

(1) *Washington Idindo v. R.* (1954), 21 E.A.C.A. 392.

Judgment

Sir Daniel Crawshaw JA, read the following judgment of the court: The appellant was convicted of murder and sentenced to

death. We do not think there is any merit in the matters raised in the memorandum of appeal. We are concerned however that the learned judge failed to obtain the opinion of the assessors on the general issue of the guilt or innocence of the appellant. The appellant had fractured the skull of the deceased by a blow with a heavy pole, and unless there was some extenuating circumstance it was clearly murder. The appellant, however, in his evidence on oath, alleged that the deceased was fighting with a man called Michael and that he, the appellant, went to separate them. He said the deceased then hit him with a thick stick, whereupon the appellant delivered the fatal blow. The prosecution evidence was that the deceased had in fact struck Michael to deter him from assaulting his, Michael's, mother, but that the appellant then came up and struck the deceased, without the deceased first striking him.

The judge's notes of summing up to the assessors contain the following, "Provocation – Heat of the moment. Sudden quarrel", so there is no reason to suppose that the learned judge did not draw the assessors' attention to the appellant's story that the deceased had struck him, and in what circumstances such an assault, if true, could reduce the offence to manslaughter. Learned State Attorney has very properly drawn our attention to the report of the medical officer who examined the appellant shortly after the incident and described eight wounds which he classified as "harm", including one on the head which required to be stitched; all, he said, could have been caused by a blunt instrument. There is no evidence how these were caused, and the judge did not mention them in his judgment; the record does not show if he mentioned them to the assessors. They seem too numerous to fit in with the appellant's story of being assaulted by the deceased.

At the end of the summing up the judge put the following two questions to the assessors, "Did he intend to kill or cause grievous bodily harm? Was he too drunk to form specific intention?" In answer to these the first assessor said, "The accused was sober and he intended to kill", and the second assessor said, "He struck the blow intending to kill the deceased. He was not drunk." In his judgment the judge said he agreed with the assessors. He also said that he did not believe the deceased attacked the accused; he did not therefore find it necessary to consider the question of provocation.

It is clear that on the evidence as a whole, including that of the appellant, the opinion of the assessors is equivocal as to the guilt of the appellant; even though there is an intention to kill there can be sufficient provocation to reduce the offence from murder to manslaughter. From their answers the judge was unable to say whether the assessors believed the appellant's story as to provocation and, if so, whether they regarded it as legal provocation, or whether they did not believe the story. Had they believed it and thought it showed legal provocation, then, on the general issue of guilt being put to them they would presumably have given it as their opinion that the appellant was guilty of manslaughter and not of murder. In *Washington Odindo v. R.* (1), it was said:

"It has also been laid down by this court that where the opinion of the assessors is taken in the form of answers to specific questions, they must also be asked to state their opinion on the case as a whole and on the general issue as to the guilt or innocence of the accused."

We cannot say whether, had the assessors been asked and given it as their opinion that there was provocation reducing the offence to manslaughter, the learned judge might not have accepted that advice. In the circumstances we feel that the appellant must be given the benefit of that uncertainty, and we accordingly set aside the conviction for murder and sentence of death, and substitute therefore a conviction of manslaughter, contra s. 195 of the Penal Code,

and sentence the appellant to eight years' imprisonment. We understood the State Attorney not to oppose this substituted conviction.

Appeal allowed. Conviction of murder set aside. Conviction of manslaughter substituted.

The appellant did not appear and was not represented.

For the respondent:

The Attorney General, Tanganyika

O. T. Hamlyn and F. B. Mahatane (both State Attorneys, Tanganyika)

S V Pandit v Willy Mukasa Sekatawa and others
[1964] 1 EA 490 (HCU)

Division:	High Court of Uganda at Kampala
Date of judgment:	8 June 1964
Case Number:	33/1964
Before:	Sir Udo Udoma CJ
Sourced by:	LawAfrica

[1] *Advocate – Remuneration – Action by advocate for professional services rendered – Claim based on oral agreement – Whether claim enforceable – Advocates Rules, r. 10 (U) – Advocates Remuneration and Taxation of Costs Rules, r. 5 (b) (U) – Advocates Ordinance, 1956, s. 55 and s. 56 (U).*

Editor's Summary

The plaintiff, an advocate, sued the defendants for a declaration that he was entitled to costs for professional services rendered when he appeared on their behalf on an appeal. The plaintiff's claim was based on an alleged agreement between the plaintiff and the first defendant acting on behalf of all the defendants. Rule 10 of the Advocates Rules provides that no agreement between an advocate and any person retaining or employing him respecting the amount and manner of payment for services, fees or disbursements shall be valid unless made in writing signed by such person, and by r. 5 (b) of the Advocates Remuneration and Taxation of Costs Rules no evidence of any agreement for remuneration of an advocate by a client is admissible in any court or before the taxing officer "unless a sufficient note or memorandum thereof has been made in writing and signed by the client or his agent in that behalf authorised". On March 1, 1959, these Rules were repealed and replaced by the Advocates Ordinance, 1956. By s. 55 it was provided that:

"an advocate may make an agreement in writing with his client . . . providing that he shall be remunerated either by a gross sum or by salary, or otherwise."

And by s. 56 (2) that:

“No suit shall be brought upon any such agreement, but the court may, on the application of any person who is a party to . . . the agreement . . . or who is alleged to be liable to pay or who . . . claims to be entitled to be paid, the costs due or alleged to be due in respect of the business to which the agreement relates, enforce or set aside the agreement or determine every question as the validity or effect thereof.”

It was not disputed that although the alleged agreement was said to have been concluded between November 26 and December 5, 1958, the plaintiff's services were not actually completely rendered until March, 1959 after the Advocates Ordinance came into force. The defendants contended that apart from factual

considerations, in terms of r. 10 of the Advocates Rules, there was no valid agreement for professional fees established and that under r. 5 (b) of the Advocates Remuneration and Taxation of Costs Rules, the evidence given by the plaintiff was inadmissible in the absence of a note or memorandum in writing signed by the defendants. They also argued that if, because the plaintiff had appeared in March, 1959, the law applicable to the alleged agreement was the Advocates Ordinance, then under s. 55 and s. 56 (2) *ibid.* the action was misconceived. The plaintiff submitted that r. 10 and r. 5 (b) (*supra*) did not apply to the agreement, as there was no definite sum fixed between himself and the first defendant in respect of the business, his case being that under the agreement he was only entitled to a reasonable fee for his professional services. He further contended that s. 55 and s. 56 (2) of the Advocates Ordinance applied since the services were only rendered in March, 1959, and that under s. 55, which was only permissive in terms, he was entitled to enter into a parole agreement with the defendants for his professional fees and that s. 56 only applied to an agreement in writing. Therefore, his claim, not being based on any agreement in writing, was well founded. In the alternative, the plaintiff submitted that on the facts he should succeed under s. 17 of the Indian Contract Act, 1872, which was the general law of Uganda when the agreement was concluded.

Held –

- (i) on the basis of the plaintiff's case r. 10 of the Advocates Rules and r. 5 (b) of the Advocates Remuneration and Taxation of Costs Rules comprised the law applicable at the time the agreement was concluded;
- (ii) in terms of those provisions there was no valid agreement capable of creating any legally enforceable right in favour of the plaintiff;
- (iii) a valid agreement for professional fees made between an advocate and his client must be in writing signed by the client against whom the agreement is sought to be enforced;
- (iv) by reason of r. 5 (b) (*supra*) there was no admissible evidence of the alleged agreement to ground the plaintiff's claim;
- (v) if s. 55 and s. 56 of the Advocates Ordinance, 1956 applied it was still necessary for any agreement sought to be enforced by an advocate against his client in respect of his remuneration to be in writing signed by the client;
- (vi) the plaintiff's claim as far as it was based on s. 17 of the Indian Contract Act, 1872 was not maintainable in law because to hold otherwise would be contrary to public policy.

Action dismissed.

Cases referred to in judgment:

- (1) *Jennings v. Johnson* (1873), L.R. 8 C.P. 425.
- (2) *In re Russell, Son & Scott* (1885), 30 Ch.D. 114.

Judgment

Sir Udo Udoma CJ: The plaintiff in this case is an advocate of this court practising in Kampala. He brings this action praying for judgment against the defendants for:

- “(a) a declaration that all the defendants are liable for his professional fees, costs, charges, disbursements, expenses and remuneration in respect of Civil Appeal No. 9 of 1959 of H.M. Court of Appeal for Eastern Africa at Kampala;
- (b) an order that the Taxing Master do proceed with taxation in the High Court Miscellaneous Cause No. 71 of 1959 and an order that the defendants

do pay the amount found due by the Taxing Master in the said Miscellaneous Cause No. 71 of 1959 with costs;

- (c) costs between solicitor and client to this action;
- (d) interest at 6 per cent. per annum on the amount found due in the said Miscellaneous Cause No. 71 of 1959 from the date of taxation to payment;
- (e) interest on aggregate of (a), (b), (c) and (d) at 6 per cent. per annum from date of judgment to payment in full.”

Plaintiff’s claim for relief is based on an agreement alleged to have been made verbally between the plaintiff and the first defendant on behalf of all the defendants in the present suit. The first defendant, who alone appeared and gave evidence at the hearing, has denied liability for the professional fees claimed by the plaintiff. He has also denied having ever entered into any agreement in respect of professional fees with the plaintiff.

The case of the plaintiff is that in 1958, in the High Court Civil Suit No. 241 of 1958 – Alfred Gaston and William Hans Barbour versus Bwavu Mpologoma Growers Co-operative Union Limited – by an order of court on the application of Bwavu Mpologoma Growers Co-operative Union Limited, seeking indemnity against the firm of architects then known as Willy and Paul in Kampala, Willy and Paul were joined as third parties to the suit.

Thereafter Willy and Paul instructed him to appear and act for them in the High Court Suit No. 241 of 1958, their previous advocate having withdrawn therefrom. He accepted the instructions and immediately thereafter settled and agreed his professional fees with Willy and Paul at the sum of Shs. 1,000/-. When however, he demanded payment, Willy and Paul could pay him only part of the agreed fees. He therefore demanded and obtained a promissory note, Exhibit O, for the sum of Shs. 239/- payable on demand, being the balance of his said professional fees. It was only after he had secured his professional fees by successfully obtaining the promissory note that he appeared and did the case in the High Court for Willy and Paul.

It is the plaintiff’s case that it was in consideration of the fees thus agreed and fixed, part whereof having thus first been paid to him and the balance thereof thus secured, that he filed in court a written statement of defence for Willy and Paul and thereafter successfully fought the case against the defendants, therein, namely, Bwavu Mpologoma Growers Co-operative Union Limited; whereupon Willy and Paul were dismissed from the suit with costs against the defendants therein to be taxed. When the judgment in the High Court Suit No. 241 of 1958 was delivered by Sheridan, J., on November 19, 1958, the first defendant was present as a representative of Willy and Paul in court.

Then on November 26, 1958, copy of a Notice of Appeal, Exhibit A, by the Advocates of Bwavu Mpologoma Growers Co-operative Union Limited was received in his office. Thereafter at his own request the first defendant reported at his office. That was before December 5, 1958. At his office he showed the first defendant the Notice of Appeal, Exhibit A, and explained to him that as the appeal was against the whole of the decision of the High Court, the appellants might, in the Court of Appeal, seek to have the decision of the Court, which was in their favour, reversed. He also advised him as to the procedure to be followed if and when the appeal was duly filed.

There and then he discussed with the first defendant the question of his professional fees. He advised him that as it was uncertain whether or not the appellants intended to proceed with their appeal, it was impracticable then to agree and fix with him his professional fees, and that the best course was for the

first defendant to agree to pay him a reasonable professional fee after the appeal,

depending upon the amount of work to be done by him in resisting the appeal including his out of pocket expenses, court fees and disbursements.

The first defendant on behalf of Willy and Paul accepted that arrangement and thereupon instructed him to act for Willy and Paul and take all the necessary steps in the appeal.

The plaintiff says that in consequence of that agreement between him and the first defendant on behalf of Willy and Paul he, on December 5, 1958, duly filed in court and for service on the parties concerned Exhibits B and B1 being notices of his address for service. On January 20, 1959, a copy of the Record of Appeal was delivered to his office. That was the Eastern Africa Court of Appeal Civil Appeal No. 9 of 1959. Thereafter he filed a supplementary record of Appeal.

On February 25, 1959, he, again, acting for Willy and Paul, filed a Bill of Costs, Exhibit J, in the Registry of the High Court in pursuance of the order of the High Court in Suit No. 241 of 1958, dismissing Willy and Paul from that suit. The bill, Exhibit J, was taxed by the Registrar of the High Court at Shs. 5,360/-. Thereafter he undertook, on behalf of Willy and Paul, not to levy execution for the realisation of the costs against the defendants concerned.

On February 27, 1959, the plaintiff received a hearing notice for the appeal. On March 18, 1959, he appeared and resisted the appeal, and on April 23, 1959, judgment was given by the Eastern Africa Court of Appeal allowing the appeal in favour of the appellants Bwavu Mpologoma Growers Co-operative Union Ltd., and thereby setting aside the order for costs which had been made by the High Court in favour of Willy and Paul.

The appeal in so far as Willy and Paul were concerned was, be it noted, not against the decision dismissing Willy and Paul from the suit but was only in respect of the order as to costs made by the High Court in favour of Willy and Paul.

It is the plaintiff's case that on July 27, 1959, he sent to Willy and Paul his bill for professional services. As a result he received from the first defendant the letter, Exhibit G. Whereupon he filed the bill for taxation in the Registry of the High Court, but the Registrar refused to proceed with the taxation of the bill because it was opposed by the first defendant, who denied having at any time retained the services of the plaintiff in connection with the appeal in the Eastern Africa Court of Appeal. Hence this action.

As already stated the first defendant has denied having at any time retained the services of the plaintiff to act for Willy and Paul in the Eastern Africa Court of Appeal Civil Appeal No. 9 of 1959. He has also denied having at any time agreed to pay a reasonable professional fee thereafter to the plaintiff for such services.

He admits, however, that he did on behalf of Willy and Paul retain the services of the plaintiff in the High Court Civil Suit No. 241 of 1958, after he and Paul had been joined as third parties in that suit, but says that on that occasion the plaintiff had immediately demanded his professional fees, which were then agreed and fixed between them at Shs. 1,000/-. Both he and Paul had paid the plaintiff part of the fees there and then; and also at the request of the plaintiff, had given him the promissory note, Exhibit O, for the balance of Shs. 239/- then remaining unpaid.

It is the case of the first defendant that at the hearing of the High Court case he had appeared and testified on behalf of Willy and Paul, and that when judgment was delivered in their favour he was also present in court because it was he who had retained the services of the plaintiff. Thereafter the first

defendant says he did not know nor was he ever informed by the plaintiff that there was an appeal against the order for costs, which was made by the High Court in their

favour against the substantive defendants in that suit. It was only on July 27, 1959, when the plaintiff came to his office and served him with a copy of the bill of costs to which was attached a letter, Exhibit N, that he learnt for the first time that there had been such an appeal.

On receiving the bill and the letter, Exhibit N, it is the first defendant's case that he immediately addressed his letter, Exhibit G, to the plaintiff denying ever having retained his services in connection with the appeal in the Court of Appeal and repudiating therefore any liability for his professional fees.

When, therefore, the bill came up for taxation before the Registrar of the High Court, he had appeared and protested. In consequence of his opposition the Registrar had declined to proceed with the taxation of the bill. The first defendant says that he did not know nor was he told until in the court at the hearing of the instant case that the costs awarded them in the High Court case No. 241 of 1958 had been taxed by the Registrar of the High Court at the instance of the plaintiff at the sum of Shs. 5,360/-.

The first defendant admits that in 1958 he was working together with Paul the second defendant, in partnership although they were not registered as such. He says that in December, 1958, both he and Paul had separated as a result of a quarrel between them and that since then they have not been on speaking terms.

In his address to this court, counsel for the first defendant has submitted that in terms of the provisions of r. 10 of the Advocates Rules (L.N. 158 of 1950 Vol. VI, Laws of Uganda at p. 549) there is no valid agreement for professional fees established by the evidence adduced by the plaintiff; and that under r. 5 (b) of the Advocates Remuneration and Taxation of Costs Rules (L.N. 213 of 1942) the evidence given by the plaintiff is inadmissible in these proceedings in the absence of a note or memorandum in writing signed by the first defendant or any of the defendants sought to be charged with liability.

Counsel for the first defendant contended that the alleged agreement for professional fees spoken of by the plaintiff, if at all made (which he denied) was reached, according to the plaintiff, after November 26, and before December 5, 1958, and therefore must come within the provisions of r. 10 of the Advocates Rules and r. 5 (b) of the Advocates Remuneration and Taxation of Costs Rules which then regulated agreements between advocates and clients in respect of professional remuneration.

If, on the other hand, submitted counsel for the first defendant, the court should hold that because the plaintiff had appeared and resisted the appeal in March, 1959 the law applicable to the alleged agreement is the Advocates Ordinance, 1956 (No. 19 of 1956, Laws of Uganda p. 70) which came into force on March 1, 1959, then under ss. 55 and 56 (2) of the Ordinance this action is misconceived and should be dismissed as the same is not maintainable in law.

On the facts, it is counsel for the first defendant's contention that the plaintiff was never at any time instructed by the first defendant to appear and act in the Appeal Court for Willy and Paul, and therefore there could be no question of any agreement as to fees between them. The plaintiff had taken upon himself the risk of resisting the appeal then without reference to the first defendant because he had a vital interest in the success of the appeal, which was only as to the costs awarded by the High Court in favour of Willy and Paul, which costs the plaintiff had taxed without instructions by or knowledge of the first defendant.

In answer to these contentions the plaintiff submitted that r. 10 of the Advocates Rules and r. 5 (b) of the Advocates Remuneration and Taxation of Costs Rules do not apply to the agreement, the subject

matter of this action, as there was no definite sum fixed between himself and the first defendant in respect of the appeal in the Court of Appeal, his case being that under the agreement he was only entitled to a reasonable fee for his professional services after the appeal.

It is the plaintiff's contention that the law applicable to the agreement is ss. 55 and 56 of the Advocates Ordinance, 1956 since the appeal was heard only in March, 1959. Under s. 55 of the Ordinance the plaintiff maintained that he was entitled to enter into a parol agreement with the defendants for his professional fees as the section is not prohibitive but permissive. Section 56 of the Ordinance, the plaintiff contended, applies only to agreement in writing and therefore, his claim, not being based on any agreement in writing, is well founded.

In the alternative the plaintiff submitted that on the facts he should be entitled to judgment under s. 17 of the Indian Contract Act, 1872, which was the general law of Uganda when the agreement between him and the defendants was concluded.

I now propose to consider these submissions. For convenience I propose to deal with the submissions of law first and then latterly with the evidence in order to ascertain what facts have been established.

The legal submissions addressed to this court by both parties have raised points of law of some importance and difficulty. The first point for determination is, which law is applicable to the alleged agreement, if any? Is it r. 10 of the Advocates Rules and r. 5 (b) of the Advocates Remuneration and Taxation of Costs Rules which then regulated the relationship between advocates and clients in 1958, but which were revoked and repealed on March 1, 1959? Or is it ss. 55 and 56 of the Advocates Ordinance, 1956, which came into force on March 1, 1959, which should apply to the alleged agreement?

This question has been complicated by the fact that although the alleged agreement is said to have been concluded between November 26 and December 5, 1958, the plaintiff's services were not actually completely rendered until March, 1959, after the coming into operation of the Advocates Ordinance No. 19 of 1956. Furthermore, the plaintiff, according to his evidence, was only to be entitled to his professional fees after the appeal should have been disposed of.

Plaintiff's case is that he was served with a copy of the Notice of Appeal, Exhibit A, on November 26, 1958. Thereafter but before December 5, 1958, he concluded the alleged agreement for his professional fees and received instructions from the first defendant to act for them in the appeal. On December 5, 1958, he filed notice of his address in court.

If that were so, it would appear that the alleged agreement took effect immediately it was concluded and the plaintiff had taken certain steps in the performance of his part of the said agreement, although the time for the payment of the fees was postponed. In which case the law, in the contemplation of the parties at the time of concluding the agreement and applicable thereto, should be r. 10 of the Advocates Rules and r. 5 (a) and (b) of the Advocates Remuneration and Taxation of Costs Rules.

It is of course true that for the plaintiff to be entitled to his full professional fees he was bound to perform completely his part of the alleged agreement, but it is equally true that at all events he would have been entitled to a claim on the quantum meruit for whatever part of the said agreement he had performed if he, for one reason or another, had found himself unable to complete his own part of the contract.

If then the law applicable is r. 10 of the Advocates Rules and r. 5 (a) and (b) of the Advocates Remuneration and Taxation of Costs Rules I think that there can be no alternative but to accept the submission of counsel for the first defendant that the alleged agreement is caught by r. 10 of the Advocates Rules the provisions of which are in the following terms:

"10. No agreement entered into by any advocate with any person retaining or employing him respecting the

amount and manner of payment for the

whole or any part of any past or future services, fees, charges, or disbursements in respect of business done, or to be done, by such advocate shall be valid unless it is made in writing signed by such person.”

It is patently obvious that in terms of the above provision there is no valid agreement before this court capable of creating any legally enforceable right in favour of the plaintiff, the agreement testified to not having been made in writing, nor signed by the first defendant or any of the defendants sought to be charged with liability. For an agreement for professional fees between an advocate and his client to be valid it must be in writing signed by the client against whom the agreement is sought to be enforced.

Then there is r. 5 (b) of the Advocates Remuneration and Taxation of Costs Rules which provides as follows:

“5(b) No evidence of any agreement for the remuneration of an advocate by a client shall be admissible in any court or before the Taxing Officer unless a sufficient note or memorandum thereof has been made in writing and signed by the client or his agent in that behalf authorised.”

Counsel for the first defendant’s submission is that the evidence given by the plaintiff about his parole agreement with the defendant is not legally admissible, and that it is obligatory on the court not to admit such evidence in the absence of a sufficient note or memorandum in writing signed by the first defendant. I think that submission is sound. I am of the opinion that by reason of the provisions of r. 5 (b) there is no legally admissible evidence of the alleged agreement to ground this claim. Rule 5 (b) of the Advocates Remuneration and Taxation of Costs Rules is preemptory, and it is the duty of this court to give effect to it.

In the event I am wrong in taking this view that the law applicable to the alleged agreement must be r. 10 of the Advocates Rules and r. 5 (b) of the Advocates Remuneration and Taxation of Costs Rules and that the law applicable, according to the contention of the plaintiff, should be the Advocates Ordinance, 1956 and the rules made thereunder, I turn now to examine the effect of that Ordinance and the relevant rules on the parole agreement as to professional fees between the plaintiff and the first defendant.

The relevant provisions of the Ordinance are ss. 55 and 56 and for the purpose of the submissions by the plaintiff, it will, I think, be sufficient to set out here-under in extenso only s. 55 but only 56 (2) of s. 56 of the Ordinance.

The provisions of s. 55 are as follows:

“55. Notwithstanding any rules for the time being in force, an advocate may make an agreement in writing with his client as to his remuneration in respect of any contentious business done or to be done by him providing that he shall be remunerated either by a gross sum or by salary, or otherwise.”

And s. 56 (2) provides as hereunder set forth:

“56(2) No suit shall be brought upon any such agreement, but the court may, on the application of any person who is a party to, or the representative of a party to, the agreement, or who is, or who is alleged to be liable to pay, or who is or claims to be entitled to be paid, the costs due or alleged to be due in respect of the business to which the agreement relates, enforce or set aside the agreement and determine every question as to the validity or effect thereof.”

The plaintiff’s contention is that the provisions of s. 55 of the Ordinance is permissive and not prohibitive and therefore that he was entitled to enter into a parole agreement with the first defendant. He says it was not obligatory on him to make the agreement in writing. It was for him to elect whether to make it in

writing or verbally, and he elected to make it verbally. Plaintiff further contends that s. 56 (2) of the Ordinance would only apply to agreements in writing and not to verbal agreements, and therefore that the court should enforce his agreement.

I must confess that I was not at all impressed, let alone convinced, by the plaintiff's contention in this respect. It is correct of course that the operative words of great importance in s. 55 may be said to be:

“may make an agreement in writing”

and that phrase, on the face of it, appears to be merely permissive, that is to say, it is enabling and not disabling an advocate to enter into an agreement with his client. I think the plaintiff's contention over-simplifies the requirements of the section.

In my view the whole of Part VI of the Ordinance entitled “Remuneration of Advocates” must be regarded as a scheme. The provisions of r. 10 and r. 5 (b) already dealt with and which were repealed and replaced by the Advocates Ordinance, 1956 and the Advocates (Remuneration and Taxation of Costs) Rules, 1959 made thereunder were, it is true, worded in stronger terms. Nonetheless it would be wrong, I think, to say that they were prohibitive in terms. Advocates were not precluded thereby from entering into agreement with their clients verbally as to their remuneration. But the law, however, refused to lend its support for the enforcement of such an agreement unless it was made in writing. The reason for such insistence is of course obvious; and it is suggested that it was in order to enable the court to scrutinise the terms of such an agreement so as to make certain that an advocate did not commit champerty or maintenance or any similar offence, or that such an agreement was not oppressive.

I am of the view that it is still necessary that any agreement sought to be enforced by an advocate against his client in respect of his remuneration ought to be in writing signed by the client. That is my reading of the provisions of ss. 55 and 56 of the Advocates Ordinance, 1956.

It is unsound for the plaintiff to argue that s. 56 (2) applies only to an agreement between an advocate and his client made in writing and not to such an agreement made verbally. The acceptance of such a proposition would, I think, result in the extraordinary situation in which it would be possible to enforce in favour of an advocate an agreement made verbally between him and his client in respect of his remuneration by an action in court whilst it would be impossible to enforce such an agreement if made in writing. That, in my view, would be an unsatisfactory state of affairs and would defeat the whole purpose of the scheme envisaged in Part VI of the Ordinance, and particularly ss. 55 and 56 thereof. The situation, I think, might be different if it was a client who had brought this action seeking to enforce the agreement as against the advocate. In that case, it would be the duty of this court to hold the advocate to his agreement for then the client would not be seeking to derive any benefit from such an agreement.

It seems to me that what s. 55 has done is to prescribe the formality which must be complied with by an advocate, who has concluded an agreement with his client as to his professional remuneration, if such an agreement is to be enforced by the court as against his client. And s. 56 (2) prohibits the bringing of any action for the enforcement of such an agreement. Which means in fact that any action brought for the purpose of enforcing such an agreement would be misconceived in law, having regard to the special procedure prescribed for that purpose under s. 56 (2) of the Ordinance. The protection is for the client and not for the advocate.

It may be of interest, and indeed, instructive to refer briefly to the law and practice in England in matters of this kind. A careful examination of the provisions of ss. 55 and 56 of the Advocates Ordinance, 1956 reveals the interesting

fact that they appear to have been adapted from ss. 4, 5, 8 and 9 of the Attorneys' and Solicitors Act, 1870 (33 and 34 Vict. c. 28).

Now the provision of s. 4 of the Attorneys' and Solicitors Act, 1870, which is similar to s. 55 of the Advocates Ordinance was considered in the well known case of *Jennings v. Johnson* (1) by the Court of Common Pleas.

There the plaintiff Jennings had brought an action against one Woolley for injury sustained by him through the negligence of Woolley's car-man, in which action he had recovered £100 damages. A rule for a new trial was made absolute that each party bear his own costs. On the second trial, the plaintiff Jennings again obtained a verdict for £100 by way of damages. The damages and taxed costs in the case were paid to, and received by the defendant Johnson, who was attorney of the plaintiff in the action for damages.

On receiving the damages and costs, the defendant deducted the sum of £45, being the taxed costs of the rule, and handed over the balance to the plaintiff. The plaintiff thereupon brought an action against the defendant, his attorney, to recover the sum of £45 as money received to his use.

At the Westminster county court the case was tried with a jury. At the hearing, the plaintiff swore that in his case against Woolley the defendant as his attorney had "agreed with him, as his attorney to charge him nothing if he lost the action, and to take nothing for costs out of any money that might be awarded to him in such action". The defendant denied that he had made such an agreement with the plaintiff. It was admitted by the plaintiff that the agreement was not in writing. The jury found for the plaintiff for £45.

It was then moved to enter a verdict for the defendant on the ground that since the Attorneys' and Solicitors Act, 1870 an agreement by an attorney to take costs other than the ordinary taxed costs must be in writing.

It was held by the Court of Common Pleas in the judgment delivered by Bovill, C.J., that there was no ground for a rule in the case. The object of s. 4 of the Act of 1870 was to enable the attorney in certain cases to claim more than he would otherwise have been entitled to. For that purpose the agreement must be in writing. Section 11 of the Act was intended to provide against champerty. But a promise not to charge anything for costs is not champerty.

Then In *re Russell, Son & Scott* (2), a motion was brought on behalf of Messrs. Russell, Son & Scott, who then were carrying on business in co-partnership as solicitors, to discharge an order obtained ex parte by William Wallis for the delivery and taxation of their bill of costs against him in a certain action in which Messrs. Russell, Son & Scott had been employed by him as their solicitor.

The relevant grounds for the purpose of the instant case in support of the application were that Wallis had entered into a parole agreement with Messrs. Russell, Son & Scott to pay them a gross sum for their costs, and that the agreement precluded him from obtaining any order for taxation.

After having given consideration to the issues of fact, Kay, J., continued (and I quote him verbatim):

"Another ground on which it is sought to discharge this order raises a somewhat important question, viz., whether a verbal agreement to pay a lump sum for past costs is binding, notwithstanding the 4th section of the Attorneys' and Solicitors Act, 1870.

Now, if I were to accept the argument which has been addressed to me on that point, the result would be that a verbal agreement for the payment of past costs in an action would be binding and not subject to revision, while an agreement in writing as to such costs would be within the operation of this section, and subject to

revision thereunder.

That may possibly have been the intention of the legislature, but as it has not been expressly stated to have been so, I cannot assume that it was. Reference has been made to *In re Whitcombe*, where it was held that a verbal agreement by a solicitor to take a sum from his client for costs was not void, though it was liable to be looked upon with suspicion. After that decision this Act was passed referring in express terms to agreements as to the payment of past and future costs, and providing for such agreements being in writing and with a special provision for the rescission of such agreements by the Taxing Master, when made in respect of business done or to be done in any action at law or suit in equity, and also, if required, by the court.

Since that Act at any rate it seems that these agreements must be in writing, and *In re Lewis*, 1 Q.B.D. 724, the Queens Bench Division held that an agreement in writing within the statute must be an agreement by both parties, and must be signed by both parties.

. . . My opinion is that since the passing of the Attorneys' and Solicitors Act, 1870, an agreement between a solicitor and his client that the solicitor is to take a lump sum for past costs should be in writing. Both the objections made to the order for taxation fail, and I accordingly dismiss this motion with costs".

I think my view, that the agreement sued upon by the plaintiff ought to have been in writing to enable the court to enforce it, is somewhat reinforced by the decisions in England in the two cases cited above. That brings me to a consideration of the claim in the alternative by the plaintiff under the Indian Contract Act, 1872. In my view the claim of the plaintiff in the alternative is not maintainable, because to hold otherwise for the reasons given above would be contrary to public policy.

The agreement, the subject matter of this suit not having been made in writing, violently contravenes the Advocates Ordinance No. 19 of 1956, which regulates the relationship between advocates and their clients in this court. The purpose of the Advocates Ordinance is to regulate such relationship and to bring an advocate within the control, jurisdiction and embrace of this court. It would be dangerous in the extreme to side-track the special provisions of the Advocates Ordinance, which regulate agreements between advocates as officers of this court and their clients. In my view, to accept the contention of the plaintiff that the Indian Contract Act, 1872, applies to the agreement between him and the first defendant would be to open a flood-gate to advocates to appear in court and act without any retainer and without any instructions from litigants in the hope that whether the client accepted their services or not, the court would always enforce their claims for professional fees under the Indian Contract Act. The result may be disastrous.

I now turn to consider the whole of the evidence in this case; and I start by stating straight away that I am not satisfied on the evidence that the plaintiff was at any time, after the High Court Civil Case No. 241 of 1958, employed and instructed by the first defendant to act for the defendants as their advocate in the Eastern Africa Court of Appeal, Civil Appeal No. 9 of 1959.

Having given careful consideration to the whole of the evidence I find as a fact that the plaintiff did not, after the High Court Civil Case No. 241 of 1958, take any instructions from the first defendant or from any of the defendants before he took steps in the Civil Appeal No. 9 of 1959, and thereafter appeared and resisted the appeal in March, 1959 in the Eastern Africa Court of Appeal; that when the plaintiff filed his bill of costs for taxation in Suit No. 241 of 1958, and later had the same taxed at Shs. 5,360/-, he neither took instructions from nor

informed the first defendant that he was doing so, and that the costs had been taxed at that figure.

I accept the submission of counsel for the first defendant and hold that the plaintiff did not trouble to take instructions from the first defendant, because as the appeal was solely against the costs awarded Willy and Paul and not against the order dismissing Willy and Paul from the suit, the plaintiff was vitally interested in the results of the appeal. That must account for the anxiety of the plaintiff to have the costs of the High Court proceedings taxed before the hearing of the appeal in the Eastern Africa Court of Appeal.

The plaintiff has himself clearly admitted in his evidence under cross-examination that he was personally interested in the results of the appeal, which was only against the order for costs, as he was entitled to a part of the costs as taxed; and out of a bill taxed at Shs. 5,360/- the defendants would only have been entitled to a refund of their instructions fee of Shs. 1,000/- together with the disbursements and costs of attendances.

It is noteworthy that even though the instructions fee agreed to be paid to the plaintiff was fixed at only Shs. 1,000/-, the plaintiff had claimed on the bill, Exhibit J, Shs. 7,000/- as instructions fee, which the Registrar had to reduce to Shs. 3,000/-.

It is common ground that as soon as the services of the plaintiff were retained by the defendants to act for them in the High Court Civil Suit No. 24/158, he not only agreed and fixed his professional fee with the defendants at Shs. 1,000/-, but insisted on being paid that fee; and where the defendants were only able to pay a part of the fee, he demanded and obtained a promissory note, Exhibit O, for the balance of Shs. 239/- before appearing in court at the hearing of the suit. The balance thus secured was not paid to the plaintiff even after the judgment in the High Court suit had been given in favour of the defendants. It therefore became necessary for the plaintiff to sue on the promissory note, and later to levy execution for the realisation of the judgment debt.

It is highly improbable that a man who was so strict, and who had made certain of extracting a promissory note from his client for the balance of his professional fees in the High Court Civil Suit No. 241 of 1958, before appearing in court to represent the defendant would, if he had received instructions from the first defendant or from any of the defendants, not have insisted in the same way on fixing his professional fees, and thereafter extracting another promissory note for the same, before appearing to resist the appeal in the Court of Appeal. Not to have insisted in settling his fees and obtaining a promissory note for the same would be contrary to logic and to his nature and inconsistent with his behaviour in Suit No. 241 of 1958.

I have carefully watched the plaintiff give evidence in the witness box. I have observed his demeanour and I find myself unable to accept his testimony, and must reject it.

I accept the evidence of the first defendant and find as a fact that he did not at any time retain the services of the plaintiff to act for them in the Civil Appeal No. 9 of 1959. I am satisfied that neither he nor any of the other defendants is liable to pay the plaintiff the professional fees claimed by them.

Having given considerable thought to the whole of the evidence in this case I have come to the conclusion that in all the circumstances of this case that the proper order to make is to refuse the declaration sought, and to dismiss this action.

This action is accordingly dismissed with costs to the first defendant.

Action dismissed.

The plaintiff in person.

For the defendants:

Kiwanuka & Co., Kampala

For the first defendant.

L. Sebalu

The second and third defendants did not appear and were not represented.

Ramji Punjabhai and another v Waljee's (Uganda) Ltd
[1964] 1 EA 501 (CAK)

Division:	Court of Appeal at Kampala
Date of judgment:	7 July 1964
Case Number:	6/1963
Before:	Sir Samuel Quashie-Idun P, Sir Trevor Gould VP and Crabbe JA
Sourced by:	LawAfrica

[1] Privy Council – Appeal – Uganda – Jurisdiction – Leave to appeal from Court of Appeal – Constitutional amendments – Her Majesty replaced by a President – Legislation that Her Majesty shall exercise no sovereignty over Uganda – Whether right of appeal to Privy Council thereby abolished – Constitution of Uganda, s. 34 and s. 96 (U) – Appellate Jurisdiction Act, 1962, s. 5, s. 7 and s. 8 – Constitution of Uganda (First Amendment) Act, 1963, s. 3, s. 4 and s. 8 (U).

Editor's Summary

Upon an application for conditional leave to appeal to the Privy Council from a final judgment of the Court of Appeal, the court considered whether, under the present constitution of Uganda, such an appeal was competent. The application was filed on August 3, 1963, when it was clear that an appeal to Her Majesty in Council from a final judgment of the Court of Appeal was competent. Section 96 of the Constitution of Uganda provided, inter alia, for appeals to Her Majesty in Council on questions relating to the interpretation of and fundamental rights contained in Chapter III of the Constitution. The Constitution also authorised Parliament to provide for similar appeals from a court of appeal (to be established) to Her Majesty in Council in other cases. Under the Appellate Jurisdiction Act, 1962, the Court of Appeal established by the Act of the Common Services Organisation became the Court of Appeal for Uganda and s. 5 of that Act provided for appeals to Her Majesty in Council. Section 34 of the Constitution as first enacted provided that there should be a Governor-General and Commander-in-Chief appointed by Her Majesty who should be Her Majesty's representative in Uganda. By the Constitution of Uganda (First Amendment) Act 1963, substantial changes were made, s. 8 thereof repealed s. 34 and

made provision for a President to be Supreme Head and Commander-in-Chief of Uganda, and s. 3 read:

“As from the 9th October 1963, the independent sovereign State of Uganda shall cease to form part of her Majesty’s dominions and Her Majesty shall cease to exercise any sovereignty over Uganda”.

It was upon the effect of this change that the submission was based that appeal to the Privy Council had, by implication been abolished, though s. 96 of the Constitution remained unrepealed and there had been no repeal or amendment of the Appellate Jurisdiction Act 1962.

Held –

- (i) so far as the law of Uganda was concerned, the constitutional amendments effected by the Uganda (First amendment) Act, 1963 did not take away the right of appeal to Her Majesty in Council from a final judgment of this court in a civil case; there could have been no such intention in a legislature which left untouched s. 96 of the Constitution and the provisions of the Appellate Jurisdiction Act, 1962;
- (ii) the judicial system in Uganda is something apart from the executive and administrative functions of government and a change in the head of the executive without more does not affect the judicial system;
- (iii) once it is accepted that the appeal to Her Majesty in Council is an appeal to a court, the mere fact that it is not a court territorially within the boundaries

of Uganda could not detract from the powers of the Uganda legislature to enact that appeals shall lie to it;

- (iv) the Constitution of Uganda as a whole manifested a consistent intention to preserve both classes of appeals, i.e. in civil and criminal cases.

Conditional leave to appeal to Her Majesty in Council granted.

Case referred to in judgment:

- (1) *Ibralebbe v. R.*, [1964] 1 All E.R. 251.

Judgment

Sir Trevor Gould VP: read the following judgment of the court: In this application for leave to appeal to the Privy Council from a final judgment of this court, the question has been raised whether, under the present constitution of Uganda, such an appeal is competent. If the appeal lies there is no dispute that the applicants are entitled to conditional leave as of right.

The application was filed on August 3, 1963, and at that date it is clear that a final judgment of this court could be made the subject of appeal to Her Majesty in Council. Section 96 of the Constitution of Uganda reads:

“96(1) An appeal shall lie as of right direct to Her Majesty in Council from final decisions of the High Court of Uganda on any question as to the interpretation of this Constitution:

Provided that if a court of appeal is established under subsection (2) of this section an appeal shall lie as of right –

- (a) to the court of appeal from final decisions of the High Court of Uganda on the interpretation of the provisions of Chapter III of this Constitution;
 - (b) to Her Majesty in Council from final decisions of the court of appeal in any such appeal.
- (2) Parliament may make provision –
 - (a) for the establishment of a court of appeal;
 - (b) for appeals to lie from decisions of the High Court of Uganda or the High Court of Buganda to the court of appeal in cases other than those mentioned in subsection (1) of this section; and
 - (c) for appeals in cases mentioned in paragraph (b) of this subsection to lie from the court of appeal to Her Majesty in Council.
- (3) The provisions of this section shall be subject to the provisions of s. 49 (3) of this Constitution.”

It will be seen that sub-s. (1) provides for appeals to Her Majesty in Council on questions relating to the interpretation of the Constitution and the fundamental rights contained in Chapter III, and sub-s. (2) authorises Parliament to provide for similar appeals from a court of appeal (to be established) to Her Majesty in Council in other cases. Subsection (3) is not material to the present question.

Under the provisions of the Appellate Jurisdiction Act, 1962, having effect from December 9, 1962, this court (established by Act of the Common Services Organisation) became the Court of Appeal for Uganda. Section 5 of the Act reads:

- “5. Subject to the provisions of this Act, an appeal shall lie to Her Majesty in Council from a Judgment of

the Court of Appeal on an appeal to the Court under this Act in the following cases:

- (a) as of right, from any final judgment of the Court of Appeal, where the matter in dispute on the appeal amounts to or is of the value of twenty thousand shillings or upwards, or where the appeal involves directly or indirectly some claim or question relating to or respecting property or some civil right amounting to or of such value or upwards; and
- (b) at the discretion of the Court of Appeal, from any other judgment of the Court of Appeal, whether final or interlocutory, on such an appeal if, in the opinion of the Court, the question involved in the appeal is one which, by reason of its great general or public importance or otherwise ought to be submitted to Her Majesty in Council for decision.”

Section 7 (2) of the Act reads:

“7.(2) The rules of court contained in the Schedule to this Act shall apply to and in respect of appeals to Her Majesty in Council under the Constitution and under this Act, and to and in respect of such other matters incidental to such appeals as are set out therein.”

The rules in the Schedule cover procedural matters including applications for leave to appeal and the granting of conditional and final leave. Section 8 (2) of the same Act reads:

“8.(2) Any order of Her Majesty in Council made on an appeal from the High Court or the Court of Appeal, and any judgment of the Court of Appeal given in the exercise of its jurisdiction under this Act, may be executed and enforced as if it were a judgment of the High Court.”

Section 34 of the Constitution as first enacted provided that there should be a Governor-General and Commander-in-Chief appointed by Her Majesty who should be Her Majesty’s representative in Uganda. By the Constitution of Uganda (First Amendment) Act, 1963, substantial changes were made. Section 8 repealed (inter alia) s. 34 and made provision for a President to be Supreme Head and Commander-in-Chief of Uganda. Section 4 abolished the office of Governor-General and s. 3 reads:

“3. As from the 9th October, 1963, the independent sovereign State of Uganda shall cease to form part of her Majesty’s dominions and Her Majesty shall cease to exercise any sovereignty over Uganda.”

It is upon the effect of this change that the submission is based that the appeal to the Privy Council has, by implication, been abolished, though s. 96 of the Constitution remains unrepealed and there has been no repeal or amendment of the Appellate Jurisdiction Act, 1962.

Recent legislation in the United Kingdom makes it clear that laws of the United Kingdom touching Uganda remain unaffected by the fact that Uganda ceased, on October 9, 1963, to be part of Her Majesty’s dominions. Section 1 of the Uganda Act, 1964, reads:

“1.(1) Subject to this Act, all law which whether being a rule of law or a provision of an Act of Parliament or of any other enactment or instrument whatsoever, was in force on 9th October 1963 (being the date on which Uganda ceased to be part of Her Majesty’s dominions), or, having been passed or made before that day, comes or has come into force thereafter, shall, unless and until provision to the contrary is made by Parliament or some other authority having power in that behalf, have the same operation in relation to Uganda, and persons and things belonging to or connected with Uganda, as it would have apart from this sub-section if Uganda had not ceased to be part of Her Majesty’s dominions.

- (2) This section applies to law of or of any part of the United Kingdom the Channel Islands and the Isle of Man and, in relation only to any enactment of the Parliament of the United Kingdom or any Order in Council made by virtue of any such enactment whereby any such enactment applies in relation to Uganda, to law of any other country or territory to which that enactment or order extends.
- (3) This section shall be deemed to have had effect from 9th October, 1963.”

Section 3 of the same Act applies with greater particularity to the subject of appeals. It is as follows:

- “3.(1) Her Majesty may by Order in Council confer on the Judicial Committee of the Privy Council such jurisdiction in respect of appeals to Her Majesty in Council from the Court of Appeal for Eastern Africa on appeal from a court or judge in Uganda, being appeals which were pending immediately before 9th October, 1963 and in which the records had been registered in the Office of the Privy Council before that day, as appears to Her to be appropriate for giving effect to any arrangements between Her Majesty’s Government in the United Kingdom and the Government of Uganda for any such appeals to be continued before and disposed of by that Committee.
- (2) An Order in Council under this section may determine the practice and procedure to be followed on any appeal in which the said Committee have jurisdiction under this section, and in particular may provide for the form of any report or recommendation to be made by that Committee in the exercise of that jurisdiction, and for its transmission to such authority in Uganda as may be specified in the Order, and may contain such other incidental and supplemental provisions as appear to Her Majesty to be desirable.
- (3) An Order in Council under this section may be made so as to have effect from 9th October 1963 and may be varied or revoked by a subsequent Order in Council.
- (4) Except so far as otherwise provided by an Order in Council under this section, and subject to such modifications as may be so provided, the Judicial Committee Act 1833 shall apply in relation to appeals in which the Judicial Committee of the Privy Council have jurisdiction under this section as it applied before 9th October 1963 in relation to appeals to Her Majesty in Council from Uganda.
- (5) Except as provided by an Order in Council under this section or by the law of Uganda, no appeal from Uganda shall be entertained by the Judicial Committee of the Privy Council.”

Section 3 (1) applies to pending appeals in which the records had been lodged in the Office of the Privy Council before October 9. The jurisdiction which may be conferred upon the Judicial Committee to dispose of such appeals does not depend upon any Uganda law but it would appear that it would only be conferred after arrangements had been made between the governments of the two countries. The present intended appeal does not fall within this category. Section 5 (3) however is directly relevant.

Before examining the effect of the United Kingdom Act we propose to look at the position in Uganda immediately after the passing of the Uganda (First Amendment) Act, 1963. We are satisfied that, so far as the law of Uganda is concerned, the constitutional amendments effected by the Act did not take away the right of appeal to Her Majesty in Council from a final judgment of this court in a civil case. There can have been no such intention in a legislature

which left untouched s. 96 of the Constitution and the provisions of the Appellate Jurisdiction Act, 1962. It was pointed out in argument that s. 96 (1) of the Constitution could not be effectively altered by Act of Parliament without the consent of the Legislative Assemblies of the Kingdom of Buganda and the various Federal States. We do not find this a relevant consideration except in that in our view it provides very strong ground for holding that what Parliament could not do by direct enactment without those consents it could not, a fortiori, do by implication. If the direct repeal by Parliament of s. 96 (1) would be inoperative, legislation designed to achieve the same result indirectly must surely be ineffective for the purpose. The appellate Jurisdiction Act, 1962, on the other hand, could have been amended by Act of Parliament, but that has not been done. The position in Uganda is therefore quite different from that in Kenya under s. 17 (1) of the Kenya Independence Order in Council, 1963, which specifically provides that no appeal will lie to Her Majesty in Council – an appeal to the Judicial Committee is substituted by the Constitution.

In thinking that the civil appeal to Her Majesty in Council remained part of the law of Uganda we are influenced by the examination of the history and status of the Privy Council appeal by their Lordships in *Ibralebbe v. R.* (1). We do not propose to reproduce any part of that judgment but would only emphasize those portions thereof which indicate that the Judicial Committee is in substance an independent court of law and that the Orders in Council giving effect to its decisions are not law making orders but judicial orders on appeal. We do not think that, from the point of view of the law of Uganda, the basic difference between the position in Ceylon when the *Ibralebbe case* (1) was being considered, and that in Uganda since the amendment of the Constitution, is material. We refer to the fact that Ceylon still had a Governor-General whereas Uganda has not. The judicial system in Uganda is something apart from the executive and administrative functions of Government and a change in the head of the executive without more does not affect the judicial system. Once it is accepted that the appeal to Her Majesty in Council is an appeal to a court, the mere fact that it is not a court territorially within the boundaries of Uganda cannot detract from the power of the Uganda legislature to enact that appeals shall lie to it. It would, of course, be necessary for any such court to have power under its own constitution to receive and entertain such appeals.

That brings us to the second aspect of the question. The appeal provided for in Uganda is to Her Majesty in Council. Has the United Kingdom legislation, which is set out above, precluded the hearing of an appeal so expressed, by saying in effect that Uganda must provide for an appeal to the Judicial Committee of the Privy Council in those very words; or is the United Kingdom legislation designed to remove certain difficulties which arise by the removal of Uganda from Her Majesty's Dominions and to continue to make available for Uganda subjects the same court of appeal as was available and contemplated by Uganda legislation up to October 9, 1963? If the latter is the case, it would be reasonable to say that the obvious intention of the Uganda legislation should be given effect to by the Judicial Committee which is the court of appeal clearly indicated by the phrase "Her Majesty in Council."

This question, as we see it, is not for this court to answer but for the Judicial Committee itself. This court derives its jurisdiction, as to hearing of appeals, and as to granting leave to appeal to Her Majesty in Council, from Uganda legislation alone. The law of Uganda includes provisions and rules under which this court must give conditional and final leave to appeal to Her Majesty in Council provided certain requirements are fulfilled. So long as that law remains unrepealed (and we have given our opinion that such is the position) we think the duty of the court is clear. It must give such leave and it is for the Judicial Committee to decide whether it has jurisdiction.

In case we are wrong in that approach, we will give briefly our view on the effect of the Uganda Act, 1964. One of the main objects of s. 3 appears to be that expressed in sub-s. (2) thereof. Provision made under that subsection could avoid the necessity for an Order in Council to give effect to the decision of the Judicial Committee as a court. We read the words in sub-s. (2) –“any appeal in which the said Committee have jurisdiction under this section”, as including the jurisdiction under sub-s. (5) to hear appeals provided for by the law of Uganda. The provision in sub-s. (2) seems to be designed to avoid difficulties which might arise under s. 21 of the Judicial Committee Act, 1833, providing for the carrying into effect of the order or decree of the Queen in Council, by reason of the limitation of that section to “His Majesty’s dominions abroad”. The section effects no change in the Judicial Committee itself though there is power to modify the provisions of the Judicial Committee Act, 1833. We do not think that a different method of reporting and transmitting the decision of the Judicial Committee changes the nature of that tribunal to an extent that makes it a different body from the Judicial Committee which the Uganda legislation obviously intended to be its appellate tribunal under the description of Her Majesty in Council. We think therefore that the intent of the law of Uganda is to be looked at and that the existing provisions fall sufficiently within s. 3 (5) of the Uganda Act, 1964; that is also the view preferred by the learned Solicitor-General who appeared on the application as *amicus curiae*.

We have not considered it necessary to deal with the appeal in purely criminal cases, leave for which is not a matter for this court. Such cases are not dealt with in the legislation to which we have referred, but it seems probable that they are within the terms of s. 18 (3) of the Uganda (Independence) Order in Council 1962, which established the Constitution. Section 18 (3) reads:

- “(3) Until Parliament otherwise provides appeals shall lie from the court of appeal to Her Majesty in Council (in addition to appeals which lie under the proviso to section 96 (1) of the Constitution of Uganda) in such cases as, immediately before the commencement of this Order, appeals lay from Her Majesty’s Court of Appeal for Eastern Africa to Her Majesty in Council in proceedings or matters originating in the courts of Uganda, and upon the same conditions and in accordance with the same procedure as was then applicable to those appeals.”

We need not pursue this topic beyond the comment that immediately before the commencement of the Order, appeals in criminal matters lay from Her Majesty’s Court of Appeal for Eastern Africa (this court as originally constituted) to Her Majesty in Council and the provision for appeals in civil cases made by the Appellate Jurisdiction Act, 1962, does nothing to negative the criminal appeal preserved by this subsection. The Constitution as a whole, therefore, manifests a consistent intention to preserve both classes of appeals.

In the result we grant conditional leave of appeal to Her Majesty in Council. The conditions have been agreed by counsel in relation to the draft order filed. In paragraph 1 the amount of the security is Shs. 10,000/- and the period 90 days. The period in paragraphs 2, 3, 4 and 5 is 90 days: the period in paragraph 7 is 15 days: the stays of execution embodied in the order of this court dated the 5th December, 1963, to be continued until the hearing of the appeal.

Conditional leave to appeal to Her Majesty in Council granted.

For the applicants:

Satish Guatama, Nairobi

S. C. Guatama and *N. K. Radia*

For the respondent:

F. R. S. DeSouza, Nairobi

S. H. Dalal

M. J. Starforth (Solicitor General, Uganda) as amicus curiae.

Nizar Hassam Mangalji & others v Uganda
[1964] 1 EA 507 (HCU)

Division: High Court of Uganda at Kampala
Date of judgment: 24 August 1964
Case Number: 544, 545 and 546/1964
Before: Sheridan J
Sourced by: LawAfrica

[1] *Agriculture – Coffee industry – Transacting business in relation to coffee without licence – Congo coffee in transit through Uganda – Coffee purchased in Uganda – Whether Congo subject to Coffee Ordinance 1959 (U).*

[2] *Customs – Interfering with goods subject to customs control – Meaning of “interference” in East African Customs (Management) Act, 1952 s. 13 (2)(b).*

[3] *Customs – Possession of uncustomed goods – Mens rea – Burden of proof.*

Editor’s Summary

The appellants were convicted of transacting business in relation to coffee without a licence, interfering with goods subject to customs control and of possessing uncustomed goods. The evidence was that one B. had bought 547 bags of coffee in Congo for export to Mombasa; that the coffee entered Uganda in transit for Mombasa and passed through the Uganda Customs post at Mpondwe; that the coffee was stolen by B.’s agent and sold and delivered to one R. at Fort Portal in Uganda and that R. resold the coffee to the appellants, also at Fort Portal. On appeal it was submitted inter alia that the prosecution of the third appellants as a firm was wrong since all the partners of the firm were not before the Court; that the Coffee Ordinance 1959 did not apply to Congo coffee at all or to coffee in transit; that under s. 13(2)(b) of the East African Customs (Management) Act, 1952, there should be physical interference with the goods; that the person who interfered with the coffee was B.’s agent who sold it to R. and that the subsequent purchase and storage of the coffee by the appellants did not amount to interference.

Held –

- (i) by reason of the wide definition of the word “person” in s. 4 of the Penal Code and the absence of any special definition of the same word in the Coffee Ordinance 1959 the third appellants were properly charged in relation to the first count; further as the definition of the word “person” in s. 2 of the Interpretation Act includes bodies of persons, corporate or incorporate, the appellants were

properly charged in relation to second and third counts;

- (ii) the Coffee Ordinance 1959 applies to all coffee in relation to which there are dealings in Uganda and as the appellants were not licenced to transact business in relation to coffee under r. 3 of the Coffee (Dealing and Storage) Rules 1959, they were rightly convicted under r. 8 *ibid.* on the first count;
- (iii) any act which took the goods out of the control of the Customs constituted interference; the coffee was still subject to such control when the appellants purchased it;
- (iv) the magistrate misdirected himself as to s. 167 (a) of the East African Customs (Management) Act, 1952 which requires proof of guilty knowledge;
- (v) the coffee was “uncustomed goods” within the definition in s. 2 of the East African Customs (Management) Act, 1952 but the magistrate misdirected himself on the onus of proving guilty knowledge for the offence of possessing uncustomed goods and drew the wrong inferences in finding that guilty knowledge had been established.

Appeal against first and second counts dismissed. Appeal against third count allowed.

Cases referred to in judgment:

- (1) *Benmax v. Austin Motor Co. Ltd.*, [1955] 1 All E.R. 326.

Judgment

Sheridan J: The three appellants were convicted by the senior resident magistrate at Fort Portal on the following charges:

Count 1: Transacting business in relation to coffee without a licence contrary to Rule 3 and Rule 8 of the Coffee (Dealing and Storage) Rules, 1959, made under s. 64 of the Coffee Ordinance, 1959.

Particulars of Offence: United Coffee Buyers, Pyarali Jeraj and Nizarali Hassam Mangalji, on or about the September 14, 1963, at Fort Portal, in the Kingdom of Toro, transacted business in relation to coffee, that is to say bought 547 bags of Congo Coffee without a licence or otherwise than in accordance with such licence.

Count 2: Interfering with goods subject to Customs Control contrary to ss. 13(2)(b) and 13 (4) of the East African Customs (Management Act) 1952.

Particulars of Offence: United Coffee Buyers, Pyarali Jeraj and Nizarali Hassam Mangalji, on or about September 14, 1963, at Fort Portal in the Kingdom of Toro, without authority interfered with goods subject to customs control that is to say interfered with 547 bags of Congo Coffee which were subject to Customs control.

Count 3: Possession of uncustomed goods contrary to s. 147(d)(iii) of the East African Customs (Management) Act, 1952.

Particulars of Offence: United Coffee Buyers, Pyarali Jeraj and Nizarali Hassam Mangalji, on September 15, 1963, at Fort Portal in the Kingdom of Toro, did have in their possession 547 bags of coffee which they knew or ought reasonably to have known to be uncustomed goods.

They were sentenced as follows:

<i>Count 1:</i>	1st appellant/3rd accused	– Fined Shs. 1500/- or 4 months
	2nd appellant/2nd accused	imprisonment each
	3rd appellant/1st accused	– Fined Shs. 1500/-.
<i>Count 2:</i>	1st and 2nd appellants	Fined Shs. 101/- or 32 days imprisonment.
	3rd appellant	– Fined Shs. 101/-
<i>Count 3:</i>	1st and 2nd appellants	– 18 months imprisonment each.
	3rd appellant	– Fined Shs. 8500/-

The fines were ordered to be cumulative and sentences of imprisonment to be consecutive.

The third appellants are a partnership which according to the second appellant consists of Jeraj &

Sons Ltd., of which he is a director, Ahmid Bhimji Ltd., and Sadrudin Mangalji. The first appellant is the last named's brother and he was only involved as he held his power of attorney and was one of the two signatories to the cheque for Shs. 75,000/- (Ex. 8) paid on account of the 547 bags of coffee purchased from A. Rashid on September 14, 1963.

The facts are fully set out in the judgment of the learned magistrate and may be summarized as follows.

In September 1963 Basil Yourtoglou (PW.1), a Greek coffee dealer in the Congo, as agent for a Company there bought 547 bags of Robusta Congo Coffee which was sold to Ralli Bros. He filled in the necessary Customs documents

(Ex. 2) for its export to Mombasa via Kasese in Uganda. On September 13, 1963, the Coffee passed through the Customs post at Mpondwe. In some manner not material for the purposes of this appeal the coffee which was in transit for Mombasa was diverted and on September 14, 1963, Rashid sold it to the third appellants, the second appellant conducting the negotiations. Hence the present charges.

Mr. Wilkinson, for the appellants, raised a number of points which I will try and deal with seriatim.

Firstly he objected to the prosecution of the third appellants as a firm when all the partners were not before the court. The third appellants may not be a legal entity as that expression is normally understood but here I agree with the ruling of the learned magistrate that by reason of the wide definition of the word “person” in s. 4 of the Penal Code, in the absence of any special definition in the Coffee Ordinance 1959 relating to the first count, of the same word to include bodies of persons, corporate or incorporate in s. 2 of the Interpretation Act (Cap. 1 of the Laws of the High Commission) in relation to the second and third counts, the third appellants were properly before the court.

Secondly he submitted that the Coffee Ordinance did not apply to Congo coffee at all or to coffee in transit but that it only deals with the Uganda coffee Industry. He relies on s. 49 of the Ordinance which provides that no coffee other than processed coffee shall be exported and that by the definition in s. 2 this includes coffee which has been hulled and cured and that there was no restriction on the export of hulled coffee from the Congo. While s. 49 may cover coffee originating in Uganda, and Congo hulled coffee in transit may not be affected surely different considerations apply when the Congo hulled coffee ceases to be in transit by unlawful conversion and is thrown on the Uganda market? Here I agree with the submission of counsel for the respondent, that the Ordinance applies to all coffee in relation to which there are dealings in Uganda. Otherwise the Ordinance would be strangely ineffective in coping with the admittedly vast amount of coffee being smuggled into Uganda from the Congo. It is of some significance that r. 2 of the Coffee (Dealing and Storage) Rules 1959 excludes rough-hulled coffee from the definition of “coffee” but makes no exception for Congo coffee. There was a dearth of evidence on what happens to Congo coffee in transit but I imagine that occasions may arise for it to be stored in Uganda but I imagine that occasions may arise for it to be stored in Uganda before it is exported.

This brings me to the next – third – point that the Rules do not apply to this case as this was Robusta rough-hulled coffee and not just Robusta hulled coffee. Again there was no evidence as to the distinction between these two kinds of coffee as there should have been. Rough-hulled coffee is defined in s. 2 of the Ordinance as coffee produced from Kiboka by the separation from it of husks but which has not been further processed or graded with the use of machinery. This might suggest that it refers to the removal by hand of the husk from the bean but the definition of “hullery” is “premises on which rough-hulled coffee is produced by means of mechanical power”. “Hulled coffee” is not defined in the Ordinance but I believe the distinction to exist and the evidence at the trial proceeded on this footing. It may have something to do with the degree of processing. The learned magistrate was entitled to accept the evidence of Mr. Yaourtoglou and Kedar Nath (PW.2), the Customs Officer at Mpondwe that this was Robusta hulled Congo coffee as evidenced by the transit entry (Ex.2) and to reject the apparently inconsistent evidence of Badrudin Ladha (PW.7) the third appellant’s storekeeper at Fort Portal who, having said it was Congo Robusta coffee, is recorded as answering in cross examination “Now I say that it was rough-hulled coffee-Robusta”. Also in his statement to the police on September 15 1963, (Ex.4) the second appellant did not specify that they

had bought rough hulled coffee but did so only when he came to give evidence some eight months later.

As the appellants were not licenced to transact business in relation to coffee under r. 3 of the Rules they were rightly convicted under r. 8 on the first count.

On the second count counsel for the appellants submits that the meaning of “interference” in s. 13(2)(b) of the East African Customs (Management) Act, 1952, is physical interference with the goods and that here the man who interfered with the goods was the man who converted them by selling them to the receiver and that the subsequent purchase and storage of the goods by the appellants did not amount to interference. In my view the short answer to this submission is that any act which took the goods out of the control of the Customs constituted interference. These goods were still subject to such control when the appellants purchased them and it is irrelevant that they have since been exported. Here under s. 167(b) of the Act the onus of proving the lawful transfer of the goods to them was on the appellants and they did not discharge it. The appeals on the second count are dismissed.

It was otherwise on the third count because s. 147(d)(iii) provides that any person who *knowingly* acquires uncustomed goods shall be guilty of an offence and by s. 167(a) this express provision made it necessary to prove guilty knowledge. The learned magistrate misdirected himself when he overlooked the effect of this provision by treating the onus of proof as being the same in relation to the second and third counts. He held, wrongly, that the appellants had failed to discharge this onus relying on the facts (1) that the bags were marked “Congo Coffee”, (2) that they failed to insist on the production of any documents to show that the coffee had passed through the Customs. On (1) there is no evidence that the first or second appellants saw the bags in their stores before they were seized by the police. Ladha agreed that they were not present when the coffee was off-loaded into the stores and Joseph Kasule (PW.8), the appellants porter, stated that the first appellant was not present while the coffee was being weighed. The second appellant had brought the coffee by sample.

While an appellate court should not lightly differ from a finding of a trial magistrate on a question of fact, a distinction in this respect must be drawn between perception of facts and the evaluation of facts. Where the sole question is the proper inference to be drawn from specific facts, an appellate court is in as good a position to evaluate the evidence as the magistrate, and should form its own independent opinion, though it will give weight to the opinion of the magistrate, see *Benmax v. Austin Motor Co. Ltd.* (1). Here the learned magistrate perceived the fact that the bags bore Congo labels but failed to evaluate the effect of that finding in that the evidence negated any conclusion that the appellants saw or must have seen the bags before they were seized by the police.

As to (2) the learned magistrate overlooked the fact that the purpose of the appellants business, with the blessings of the Customs and Agricultural Departments was to buy smuggled Congo coffee in order to prevent it getting mixed with Uganda coffee and so adversely affect the Uganda quota and revenue. This is borne out by the documentary evidence (Exs. 6, 11, 12, D.1 and D.2) the significance of which the learned magistrate failed to appreciate. The appellants paid a reasonable price for the coffee, the transaction was not clandestine and they had had previous dealings with Rashid. As to insisting on Customs documents there was no evidence that they would leave the custody of that Department or that copies would be supplied.

In support of their contention that the appellants were innocent purchasers for value of the coffee the defence called Alistair Will (D.W. 2), the Agricultural Officer in charge of Toro at the time. He testified that while the appellants were

requested and authorised to buy uncustomed coffee from the Congo at two points only, Bubandi and Ishango, he gave them verbal permission to buy it at Fort Portal as much Congo coffee was arriving there and buyers were buying it on their licences and nothing could be done about it. He agreed that he did not put this permission in writing. That might point to neglect of duty on his part but the learned magistrate reacted violently to this evidence and denounced this witness as an unmitigated liar. I fail to see how these strictures were justified. Will's evidence was true and uncontradicted, the only controversial matter being the giving of the verbal permission. The learned magistrate did not comment adversely on his demeanour, as he could have done in a proper case, and I fail to see where there was any admissible evidence to impeach his credit. The second appellant informed the police of this evidence in his statement dated September 18, 1963 (Ex. 5) and as they took no steps regarding it for eight months, may it not be assumed that they accepted it as true? Otherwise one might have expected Will to share the dock with the appellants. As far as I am aware he may still be an Agricultural Officer at Kawanda despite the learned magistrate's castigation of his evidence.

It was stressed in the *Benmax* case (1) (supra) that an appellate court should rarely interfere with a trial judge's decision about the credibility of a witness as he had the advantage of seeing and hearing the witness but that the weight of the other evidence may be such as to show that the trial judge must have formed a wrong impression. In my opinion this evidence, which is largely corroborated by the correspondence passing between the Customs and Agricultural Departments and the appellants, should not have been rejected.

The only evidence against the first appellant was that he lied to the police in his statement (Ex. 3) when he denied that any coffee had been bought. The learned magistrate correctly directed himself that his lies were not sufficient for his conviction but went on to say that he was not prepared to accept that he was as innocent as the second appellant had tried to make him, which is a complete non-sequiter. Apart from that there was only his signature on the cheque.

While I am satisfied that there were "uncustomed goods" within the meaning of the definition in s. 2 of the Act in that they were being dealt with contrary to the provisions of the Customs laws, i.e., contrary to s. 13(2)(b), the learned magistrate misdirected himself on the onus of proving guilty knowledge for this offence and drew the wrong inferences in finding that guilty knowledge had been established.

I allow the appeals on the third count and set aside the convictions, sentences and fine which, if paid must be refunded to the third appellants.

Appeals against the first and second counts dismissed. Appeal against third count allowed.

For the appellants:

Wilkinson & Hunt, Kampala

P. J. Wilkinson and B.E. D'Silva

For the respondent:

The Director of Public Prosecutions, Uganda

A. K. Korde (State Attorney, Uganda)

Semi Longa v Uganda

[1964] 1 EA 512 (HCU)

Division: High Court of Uganda at Kampala
Date of judgment: 11 September 1964
Case Number: 120/1964
Before: Sir Udo Udoma CJ
Sourced by: LawAfrica

[1] Criminal law – Theft by public servant – General deficiency in account – Servant in charge of post office – General deficiency in imprest account – No evidence of any specific sum stolen at any specific date – Charge alleging general deficiency of account.

Editor's Summary

The appellant was employed as a clerk in the public service and was in charge of the Post Office at Moyo, in which capacity he was responsible to the Post Master at Gulu for an imprest account of Shs. 1550/- held at Moyo. Seven months after the appellant took charge of the post office at Moyo the accounts were checked and a general deficiency of Shs. 749/79 was found. The appellant was subsequently charged with and convicted of stealing by a person employed in the public service. On appeal it was contended that as the case was in the nature of a general deficiency in account, in that there was no proof of any specific sum having been stolen by the appellant on any particular day, the magistrate was wrong in convicting the appellant of stealing the general balance found short in his account. It was also submitted that the charge was bad in law as it alleged a general deficiency namely, a theft of a lump sum without stating when the theft had occurred.

Held –

- (i) in a case of embezzlement where it is possible to trace the individual sums and to prove conversion, it is undesirable to include them all in one count alleging a general deficiency, but where it is impossible to trace individual sums and the evidence for the prosecution makes it clear that there has been a theft of either the whole or part of a general balance, it is quite proper to charge a theft of the general balance;
- (ii) on the evidence, it was utterly impossible to trace the individual sums stolen and the dates thereof; accordingly it was quite proper to charge the appellant with theft of the general deficiency of the account.

Appeal dismissed.

Cases referred to in judgment:

- (1) *R. v. Lloyd Jones* (1838), 8 Car. & P. 287; 173 E.R. 498.
- (2) *R. v. Morris* (1939), 24 Cr. App. R. 105.
- (3) *R. v. Thomas Wright* (1858), Dears & Bell 431; 173 E.R. 1070.

- (4) *R. v. Tomlin*, [1954] 2 Q.B. 274; [1954] 2 All E.R. 272
- (5) *R. v. Balls* (1871), L.R. 1 C.C.R. 328.
- (6) *R. v. Lawson*, [1952] 1 All E.R. 804; 36 Cr. App. R. 30.

Judgment

Sir Udo Udoma CJ: The appellant was convicted by the resident magistrate, Gulu, of stealing by a person employed in the Public Service contrary to ss. 252 and 257 of the Penal Code. He was sentenced to three years imprisonment. He now appeals against the conviction and sentence.

The only point of law which was raised and argued before this Court and which falls for examination and decision is as to whether the charge against the

appellant was or was not in the nature of a general deficiency in account. And if it was, whether the charge was maintainable in law and the appellant rightly convicted as there was, it was contended, no evidence as to the precise period of time when the appellant was under a duty to account for the money in his possession and as to any theft of the money found short in his account. This point is an important one in law and deserves serious and careful consideration.

The evidence which was accepted by the learned trial magistrate shows that the appellant was at all times material to this case a clerk employed in the public service. The District Commissioner, Moyo, is officially and ostensibly the postal agent at Moyo, but in practice and in fact he usually assigns a clerk in his office to run and manage the affairs of the Post Office. A clerk so assigned takes full charge and control of the Post Office and is personally responsible and accountable from time to time to the controlling Post Master, Northern Region, stationed at Gulu for all moneys belonging to the Post Office in his possession at any time the latter visits Moyo on inspection duty.

In accordance with that practice the then District Commissioner, Moyo, Anthony Kalisa (PW.3) as from April 1, 1963 assigned the appellant to take charge of the Post Office at Moyo. The appellant was therefore at the material time the clerk in full charge and control of the Post Office at Moyo, and in that capacity, was responsible and accountable to the controlling Post Master, Northern Region, Gulu, then Jonathan Gaspar Semuwemba (PW.1) for the imprest account then amounting to the gross sum of Shs. 1550/- held at the Post Office, Moyo.

On November 14, 1963, Jonathan Gaspar Semuwemba (PW.1) visited the Moyo Post Office on inspection duty. He found the appellant on duty at, and in charge of the Post Office. At his request the appellant surrendered to him the Post Office keys. Jonathan Gaspar Semuwemba (PW.1) at once began to check all the Post Office accounts. He found that out of an imprest of Shs. 1550/- which Moyo Post Office keeps the appellant had in his possession and control at the time only a stock totalling Shs. 800/21, composed of:

- (1) Shs. 268/20 worth of stamps.
- (2) Shs. 222/10 worth of revenue stamps.
- (3) Shs. 32/- worth of postal orders.
- (4) Shs. 100/- worth of embossed revenue forms.
- (5) Shs. 177/91 being cash on hand.

There was therefore, Jonathan Gaspar Semuwemba (PW.1) discovered, a general deficiency in the Post Office account of the sum of Shs. 749/79.

When Jonathan Gaspar Semuwemba (PW.1) drew the attention of the appellant to the shortage, the appellant explained that he had, prior to the arrival of Jonathan Gaspar Semuwemba (PW.1) only that morning, remitted the sum of Shs. 928/10 in cash to the controlling Post Master, Gulu, to cover an indent for supplies for which he had to requisition. In support of that explanation the appellant produced a registered Post Office slip receipt No. Moyo 96 dated November 14, 1963, Exhibit P.2, and also referred to p. 25 of a duplicate order book, Exhibit P.1, purporting to contain a list of the requisition.

Jonathan Gaspar Semuwemba (PW.1), after having completed his check, later reported the shortage to the District Commissioner, Moyo, and thereafter left for Gulu. At the Gulu Post Office he discovered that the registered postal slip, Exhibit P.2, he was shown at Moyo by the appellant concerned a letter which when opened, contained an indent, No. 27, Exhibit P.3, together with the sum of Shs. 69/45 instead of the

sum of Shs. 928/10 as was stated by the appellant. Jonathan Gaspar Semuwemba (PW.1) thereupon at once relayed that discovery to Anthony Kalisa (PW.3) who, on receiving the information, questioned the

appellant about it. The appellant however continued to insist that the amount which he had remitted to Gulu was the sum of Shs. 928/10.

At the request of Anthony Kalisa (PW.3), the appellant later through his brother however refunded the sum of Shs. 749/79, by which amount his Post Office account was found short. The matter was thereafter reported to the Police and the appellant charged.

In his defence the appellant swore that in the morning of November 14, 1963, prior to the arrival of Jonathan Gaspar Semuwemba (PW.1), he had, according to the duplicate memo book, Exhibit P.1, at p. 25 indented for further supplies from Gulu amounting to the sum of Shs. 928/10 and in payment therefore he had remitted that sum to Gulu under cover of his registered letter the slip of which was No. 96, Exhibit P.2. He explained that the refund of Shs. 749/79 was made by his own brother without his approval or authority.

In his judgment the learned trial magistrate found that at the trial the appellant did not really challenge the deficiency; that there was no doubt at all that on November 14, 1963, at the time of the inspection by Jonathan Gapsar Semuwemba (PW.1) a shortage of Shs. 749/79 did exist in the imprest account maintained by the appellant; and that the appellant lied when he said that he has remitted the sum of Shs. 928/10 to Gulu to cover his indent for supplies. He therefore rejected the appellant's defence. He held that the appellant had stolen the amount of Shs. 749/79 which was discovered short in his account and that the sum was money which had come into his possession as a public servant.

These findings have not been seriously challenged by the appellant who, incidentally had appeared in person and argued most ably his own appeal, and I can find no reason to hold that they were unreasonable or that there was no evidence to support them.

The real point contested, expressed in legal terminology, would appear to be that, as the case was in the nature of a general deficiency in account in that there was no proof of any specific sum having been stolen by the appellant on any particular day, the learned trial magistrate was wrong in law to have convicted the appellant of stealing the general balance found short in his account. It was further contended that the charge was bad in law for alleging a general deficiency of money, that is to say, for alleging the theft of a lump sum arising from misappropriation of small unidentifiable sums over a period of time without stating when the theft had occurred.

Counsel for the respondent submitted that even though the charge was based on a general balance, it was competent for the learned trial magistrate to have convicted the appellant because by his own defence the appellant had himself admitted, though indirectly, that the sum of money and more was short in his account. His story that he had remitted the sum of Shs. 928/10, which was even more than the amount found short, to Gulu, was found to be untrue and rejected by the learned trial magistrate.

I propose now to consider these submissions.

I think there is authority for the proposition that on a charge of embezzlement it is not sufficient for the prosecution to prove a general deficiency in account. It is necessary that some specific sum be proved as having been embezzled at a certain period of time just as in larceny in English law some particular article must be proved to have been stolen. That was the principle established in *R. v. Lloyd Jones* (1).

There the prisoner was tried on a charge of embezzlement. The prosecutor in opening the case said that the prisoner had been a shopman to the complainant in the case and that it would be proved that there was a deficiency in the

prisoner's accounts but that there was no proof of the embezzlement of any particular sum.

Alderson, B. stopped the case. He held that it was not sufficient to prove merely a general deficiency in account. It was necessary that some specific sum be proved to have been embezzled. As it was impossible to do so he acquitted the prisoner.

In *R. v. Morris* (2), Lord Hewart, L.C.J. said:

“with regard to the fourth count, it is quite obvious that the appellant was charged with fraudulent conversion of a general balance alleged to be due and that is a course which cannot properly be taken.”

On the other hand, I think it is also correct to say that this rule is only a rule of practice and not of law. As a general rule in a prosecution on a charge of conversion of embezzlement, where it is impossible to trace individual items of property or sums of money, the evidence for the prosecution makes it clear that there has been a conversion of embezzlement of either the whole or part of a general balance at one time, it is proper to charge the conversion or embezzlement of the general balance on a day between specified dates.

In *R. v. Thomas Wright* (3), Thomas Wright was employed by a banking company to conduct a branch bank. The whole of the duties of the branch bank were discharged by him. His salary included the rent of an office in his house by the banking company provided by him for the purposes of the bank. In the office occupied by Thomas Wright there was an iron safe provided by the bank into which it was the duty of Thomas Wright to put at night money which had not been required for the purposes of the bank.

The manager of the bank kept one key to the safe and Thomas Wright another. Thomas Wright furnished weekly accounts of moneys received and paid by him, showing the balance in his hands and of what notes, cash, securities that balance consisted.

In September 1855 his accounts were audited and his cash found correct. Although for two years afterwards he furnished the usual weekly accounts no examination was during that period made of the balance appearing from those accounts to be in his hands. In September 1857 when the manager fixed an appointment to examine the cash in his hands, Thomas Wright told the manager that he was about £3000 short in cash and handed over to the manager £755 10s. which he said was all the cash he had left and which sum he took from a drawer and not from the safe.

When charged with the embezzlement of £3000 he said to the magistrate “I admit that I have taken the amount of money which appears in my weekly return dated September 12, 1857, and entered as a deficiency of £3021 9s. 9d.”

In his direction to the jury, the judge advised the jury to convict the prisoner of larceny if they were satisfied that any part of the sum of £3021 9s. 9d. had, at any time during the two years, been taken by the prisoner from money, which, having been received from customers, had prior to such taking been placed in the said safe and included in the said weekly accounts. On that direction the jury returned a verdict of guilty, having found that the prisoner stole “some money” received from customers of the bank.

On appeal it was held inter alia that the finding that the prisoner stole “some money” was sufficiently certain, it not being necessary that the jury should find that any specific amount was stolen on any particular day.

In *R. v. Tomlin* (4), where the manager of a shop rendered accounts to his employer weekly and

between stock-takings in March and September 1953

there was found to be a deficiency of £420 in his account and the manager was indicted and convicted of embezzling that sum on a day unknown between March 14, 1953 and September 28, 1953, it was held, on appeal, that the charge was maintainable. The decision of the Court of Criminal Appeal in *R. v. Balls* (5), was followed.

In his judgment Pearson, J. said ([1957] 2 Q.B. at p. 280):

“In the present case we feel no doubt that when the stock-taking took place in September and shoes to the value of £420 15s. 3d. were found, as the Jury’s verdict implies, to have been sold the appellant was under a duty to account then for the proceeds of the sale if he had not done so before; and the fact that he may have been also under a duty to account week by week for the proceeds arising during each week, and might, as in *R. v. Balls* ‘have been indicted for embezzling any of the separate sums received by him’, does not prevent him from being indicted for embezzling the aggregate of those sums.”

In the instant case there is a clear and undisputed evidence, which was accepted by the learned trial magistrate, that the appellant was under a duty to account to the controlling Post Master, Gulu, when at Moyo on official duty of inspection for all the moneys in his possession and control belonging to the Post Office. It was in the course of that process of accounting that Jonathan Gasper Semuwemba (PW.1) discovered that the appellant was deficient in the sum of Shs. 749/79. It was no doubt to cover up that shortage that the appellant invented the untruthful story that he had remitted the sum of Shs. 928/10, which was far in excess of the balance required of him, to Gulu.

It was the clear duty of the appellant to produce and tender to the controlling Post Master, Northern Region, at the time of the checking the total balance of Shs. 749/79 on November 14, 1963, which he failed to do. His failure to produce the balance of Shs. 749/79 considered in the light of his untruthful explanation must lead to the reasonable and irresistible inference that he had stolen that sum of money. For on the evidence, it was utterly impossible to trace the individual sums stolen and the date of such theft.

As was said by Lynskey, J. in *R. v. Lawson* (6), where in an ordinary case it is possible to trace the individual items and to prove conversion of individual property or money it is undesirable, and in order to avoid injustice, to include them all in one count alleging a general deficiency. Such a count may be had for uncertainty. But where, as in the instant case, it is impossible to trace individual items or sums of money and the evidence for the prosecution makes it clear that there has been theft of either the whole or part of a general balance, it is quite proper, in my view, to charge a theft of the general balance. It is therefore not correct to say that the charge in this case was not maintainable because it was bad in law. The contention is rejected as unsound. This appeal must therefore fail only as to conviction. It is therefore in that respect dismissed.

I think the sentence of three years imposed by the learned trial magistrate on the appellant was certainly excessive having regard to the age of the appellant and the sum of money involved in the case. The appellant is only 21 years of age and the sum stolen is Shs. 749/79, of which in any case, restitution has been made. This, in my view, is a suitable case in which sentence should be imposed as a corrective rather than punitively.

In the circumstances this appeal is allowed only as to sentence. The sentence of three years imposed on the appellant is reduced to one of eighteen months imprisonment. This reduction shall take effect as from the date of the conviction of the appellant by the learned trial magistrate. It is ordered that this appeal be and is dismissed as to conviction only. The sentence of three years

imprisonment be and is reduced to one of eighteen months imprisonment. Sentence to date as from the date of conviction. Court below to carry out this order.

Appeal dismissed.

The appellant in person:

For the respondent:

The Director of Public Prosecutions, Uganda

A. K. Korde (State Attorney, Uganda)

**Coast Brick and Tile Works Limited and others v Premchand Raichand
Limited (No 2)**
[1964] 1 EA 517 (CAN)

Division:	Court of Appeal at Nairobi
Date of judgment:	26 June 1964
Case Number:	37/1962
Before:	Sir Samuel Quashie-Idun P, Sir Daniel Crawshaw and Crabbe JJA
Sourced by:	LawAfrica

(Reference on taxation under Rule 6 (2) of the Eastern African Court of Appeal Rule, 1954.)

[1] Costs – Taxation – Appeal – Counsel’s fees – Instructions fee – Three Counsel briefed – Counsel from England engaged with a leader of local bar and junior counsel – Alleged that costs claimed oppressive – No error in principle by Taxing Officer.

Editor’s Summary

Following the decision reported at [1964] E.A. 187, the first respondent filed a bill of costs for taxation amounting to Shs. 85,853/75 inclusive of disbursements. At the taxation counsel for the appellants objected to all these items except those allowed as customary, but mainly to the fee claimed for instructions, Shs. 30,000/-, and an item comprising brief and refresher fees amounting to Shs. 37,400/- paid to counsel brought out from England for the appeal. The appellants claimed that these fees were fantastic, that unsuccessful litigants should be protected against oppressive claims for costs, that the first respondents were represented by three counsel of whom two were Queen’s Counsel, that the engagement of counsel from England should not affect the amount allowed and that the criterion for assessing the fee for instructions was a reasonable fee for average senior and junior counsel. Counsel for the first respondent relied upon the numerous grounds of appeal and authorities cited, the length of the hearing,

that the bill was a respondent's bill and the importance and difficulty of the case. In his ruling the Taxing Officer held that whilst it is not uncommon for counsel for unsuccessful parties to minimize the importance and difficulty of the case and for counsel for the successful parties to submit that the case was complex and most important, the appeal was complicated and the amount involved was substantial but it was not an appeal which necessarily required eminent counsel from England. He accordingly allowed Shs. 15,000/- for brief and refresher fees paid to counsel from England and Shs. 10,000/- for instructions. The appellants then had the decision of the Taxing Officer referred to a judge of the appellate court, who held that the Taxing Officer had not been shown to have erred in principle and, since insufficient material had been put before him to enable him to find that the amount allowed was manifestly excessive, he was not prepared to substitute his own assessment for that of the Taxing Officer, who was in better position to compare the amount allowed with other cases. On further reference to the full court at the instance of the appellants.

Held – there were no grounds to justify interference with the well considered ruling of the Taxing Officer or with the equally reasonable ruling of the Vice-President.

Application dismissed.

Judgment

Sir Samuel Quashie-Idun read the following judgment of the court: We can find no grounds in the application to justify an interference with the well considered ruling of the taxing master or with the equally reasonable Ruling of the learned Vice-President.

It is our view that there has been no departure on the part of the taxing master from the principles which govern taxation of costs, taking, as we do, the same view as the Vice-President as to the basis of the Registrar's assessment of "refreshers". We note that the Vice-President stated in his ruling that in his opinion the award of the taxing master was rather high, but he did not feel justified to interfere with the ruling of the taxing master as the taxing master was in a better position than the Vice-President was to make a comparison of the cases with which the Taxing Master had dealt. We are in the same position as the Vice-President and we think that the application referred to this court should be disallowed with costs, and it is accordingly dismissed.

Application Dismissed.

For the applicants:

Velji Devshi & Bakrania, Nairobi

D. N. Khanna and Velji Devshi

For the respondents:

J. J. & V. M. Patel, Nairobi

J. J. Patel

Mulaba Mageni v Republic [1964] 1 EA 518 (CAD)

Division:	Court of Appeal at Dar-es-Salaam
Date of judgment:	8 September 1964
Case Number:	30/1959
Before:	Sir Daniel Crawshaw, Sir Clement De Lestang and Duffus JJA
Sourced by:	LawAfrica
Appeal from:	The High Court of Tanganyika – Jefferies, Ag. J.

[1] Criminal law – Evidence – Assessors – Opinions given by assessors – Accused offering evidence after opinions given – Whether judge empowered to hear such evidence after opinions given.

Editor's Summary

The appellant was convicted of murder. At his trial, after the assessors had given their opinions but before judgment, the appellant said "I want to explain what I saw on the day on which I killed and I was about to be killed." The trial judge refused to hear the appellant further, being of the opinion that he had no power to do so at that stage of the trial. On appeal,

Held –

- (i) a judge has power to hear additional evidence after the assessors have given their opinions and before judgment; in such circumstances the opinions of the assessors can be taken again;
- (ii) the judge was wrong in refusing to hear the further statement which the appellant wished to make and in the circumstances the conviction should be set aside.

Appeal allowed. Conviction for murder quashed and sentence set aside.

Judgment

Sir Daniel Crawshaw JA: read the following judgment of the court: After the assessors gave their opinions, but before judgment, the appellant said, “I want to explain to your Lordship exactly what I saw on the day on which I killed and I was about to be killed”. The judge refused to hear the appellant further, being of the opinion that he had no power to do so at that stage of the trial. The appellant had earlier made a statement in his defence which the judge had not believed. He thought it possible that it had been fabricated in the hope of having the offence reduced to manslaughter. The judge expressed the view however that had the appellant told the truth it was possible that it would have shown “some sort of quarrel” between the appellant and the deceased which might have reduced the offence to manslaughter. We think that the judge was wrong to think that he had no power to hear the further statement which the appellant wished to make. The assessors merely express an opinion to the judge, and we see no reason why additional evidence should not be accepted thereafter, and their opinion then taken again.

In the circumstances of this case we allow the appeal and we set aside the conviction and sentence.

Appeal allowed. Conviction of murder quashed and sentence set aside.

The appellant in person.

For the respondent:

The Attorney General, Tanganyika

O. T. Hamlyn and F. B. Mahatane (both State Attorneys, Tanganyika)

Republic v Dick [1964] 1 EA 519 (HCT)

Division:	High Court of Tanganyika at Arusha
Date of judgment:	7 May 1964
Case Number:	27/1964
Before:	Liam Duff Ag J
Sourced by:	LawAfrica

[1] Contempt of court – Letter written to magistrate asking for copy of criminal proceedings heard before him – Letter written by public officer – Statement in letter that fine imposed somewhat lenient – Letter treated as intentional disrespect to judicial proceeding and to magistrate – Appeal.

Editor's Summary

Following a criminal case before a magistrate involving possession of a leopard skin in which the accused was convicted and fined Shs. 50/-, the regional game warden wrote a letter to the magistrate asking for a copy of the proceedings and judgment. In his letter, which was copied to the state attorney, the game warden said that in view of the value of the trophy he considered the sentence somewhat lenient. The magistrate treated this letter as an act of intentional disrespect to a judicial proceeding and to himself as magistrate and a warrant for the arrest of the game warden was issued by his court without and complaint having been made as required by s. 90 of the Criminal Procedure Code. When the game warden was brought before the magistrate and charged with contempt of court, he was not given an opportunity to show cause why he should not be convicted but instead was asked to show cause why he should not be punished. The game warden replied that he did not intend a contempt, admitted the contents of the letter and that it was a contempt, whereupon the magistrate convicted and sentenced him under s. 114(1)(i) of the Penal Code. The magistrate

treated the proceedings for contempt as part and parcel of the earlier criminal case concerning the game trophy. In revision,

Held –

- (i) an offence contrary to s. 114 (1) of the penal Code is a misdemeanour and a person charged with such an offence should not be arrested without a warrant; as the warrant was issued without any complaint having been made as required by s. 90 of the Criminal Procedure Code, the proceedings against the accused were irregular;
- (ii) the conviction under s. 114(1)(i) was wrong because that subsection refers to an offence committed whilst judicial proceedings are in progress whereas the proceedings in question had been completed when the letter was written.
- (iii) the letter could not be described as being silly, impudent disrespectful or intemperate and publication was not calculated to lower the reputation and authority of the court in the eyes of the public; accordingly the magistrate erred in holding that the writing of the letter constituted a contempt of court.

Appeal allowed. Conviction quashed and sentence set aside.

Cases referred to in judgment:

- (1) *Joseph Odhengo Ogongo v. R.* (1954), 21 E.A.C.A. 302.
- (2) *R. Sullivan and Pigott*, 11 Cox C.C. 44.
- (3) *McLeod v. St. Aubyn*, [1899] A.C. 561.
- (4) *R. v. Gray*, [1900] 2 Q.B. 40; [1900] All E.R. Rep. 59.
- (5) *Ambard v. The Attorney General of Trinidad and Tobago*, [1936] 1 All E.R. 704.
- (6) *Mullery v. R.* [1957] E.A. 138. (C.A.)
- (7) *R. v. Faulkner*, 2 Mont. and A. 311.

Judgment

Liam Duff Ag J: In this case which has come before the court for revision on the application of learned counsel for the accused, It appears that the latter was dealt with and convicted of contempt of court contrary to s. 144 (i) of the Penal Code. The particulars of the offence are as follows:

“The person charged on the 15th day of April, 1964, in the township and district of Arusha, Arusha Region, did commit an act of intentional disrespect of a judicial proceeding and to the learned magistrate before whom such proceeding is being had or taken; to wit: he wrote a letter dated the 15th April, 1964, in which he mentioned that the sentence passed by the learned magistrate in a criminal proceeding No. 727 of 1964 was too lenient.”

It is clear that what the learned magistrate had in mind was an offence contrary to s. 114(1)(i) of the Penal Code. The letter which gave rise to the charge is on notepaper headed with the name of the department to which the accused belongs and it is addressed to the resident magistrate, Arusha, and copied to the state attorney, Arusha. There can be no doubt that there was publication of the letter and

this I believe is accepted by all concerned. I think it as well to set out the body of the letter in full, which is as follows:

“In view of the value of the trophy concerned I consider the judgment in this case somewhat lenient and would therefore like a certified true copy of the proceedings and judgment please.”

From the particulars and from the punishment awarded it is clear that the act complained of was not considered to be in view of the court and that the learned magistrate purported to act under s. 114 (1) of the Penal Code and not s. 114 (2) of the said code. A perusal of the record of the lower court indicates that the warrant of arrest was issued on April 24, 1964, whilst the charge is dated April 25, 1964. The warrant of arrest referred to Criminal Case No. 727 of 1964,

whilst the commitment warrant also referred to this case number, the numbers, however, being changed to 960 the number given to the temporary case file involving the contempt charge. This may point to the fact that the contempt proceedings were taken as part and parcel of the earlier case which, clearly, was finished days earlier, the learned magistrate having no longer seisen of that case, or the numbers may have been inserted in error. An offence contrary to s. 114 (1) of the Penal Code is a misdemeanour and a person charged with such an offence shall not be arrested without a warrant being in existence. Section 90 of the Criminal Procedure Code provides that a warrant of arrest shall not be issued in the first instance unless the complaint has been made upon oath either by the complainant or by a witness or witnesses. There is no indication in the record that any such complaint was made, and indeed even the charge is dated after the warrant of arrest was issued as I have said earlier. It would appear from this that the proceedings were irregular.

The actual charge refers to an act committed with intentional disrespect to a judicial proceeding and the learned magistrate before whom such proceeding is being had or taken, and this is almost a repeat of what is contained in s. 114 (1) of the Penal Code. Reading the particular subsection it appears to me that what is referred to is an act committed whilst the judicial proceeding is in progress and not when the proceedings have been terminated, and I am strengthened in this view by the wording of the other paragraphs, namely: (a), (b), (c) and (d) of s. 114 (1) aforesaid, together with the provisions of s. 114 (2) which specifically refers to paragraphs (a), (b), (c), (d) and (i) as concerning offences occurring whilst the proceedings are in progress and in view of the court. It occurs to me, therefore, that the particular offence charged is not appropriate as s. 114(1)(i) refers to an offence committed whilst the proceedings were being held and it is abundantly clear that the proceedings in Criminal Case No. 727 of 1964 were completed when the accused wrote the letter. Assuming that a contempt had been committed a proper charge could have been instituted under s. 56 (a) or (c) of the Penal Code, bearing in mind that it is necessary in such a prosecution to show that something has been published which is calculated to lower the reputation and authority of the court in the eyes of the public. (I do not think that it could be suggested that the wording of the letter could be interpreted as being calculated to obstruct or interfere with the due course of justice or the lawful processes of the court.)

Assuming for a moment that the complaint had been properly made and the accused properly before the court, the record shows the accused was not given an opportunity to show cause why he should not be convicted, but instead asked to show cause why he should not be punished.

His plea reads as follows:

“I did not intend to commit a contempt of the court. It is true that I said in the letter that the sentence was somewhat lenient. I realise that the contents of the letter was a contempt of this honourable court.”

This reply could hardly be said to be unequivocal. The learned magistrate proceeded to convict the accused and then sentenced him. The method of dealing with the accused would appear to have been an attempt to follow the obiter pronouncement made in *Joseph Odhengo Ogongo v. R.* (1) and again might point to the fact that the learned magistrate had confused s. 114 (1) and s. 114 (2) of the Penal Code. I mention “attempt” because in the case last cited it was clear that what was intended was that the accused should be called upon to show cause why he should not be convicted whereas in this case he was asked why he should not be punished, he apparently being already convicted, without a plea being taken.

Leaving aside the irregularities I have referred to, I propose to deal with this case on the merits of the facts disclosed. Learned state attorney, at the outset, indicated that he was a little embarrassed in these proceedings as he was the person who had instructed the accused to apply for a copy of the proceedings and judgment in Criminal Case No. 727 of 1964. I accept that learned state attorney did not indicate to the accused what he should write, but it would not be too imaginative of me to say that the copies of proceedings and judgment were required to consider whether application should be made for enhancement of the punishment imposed in the particular case, the accused in his letter (marked Exhibit "A") actually giving the reason why he was applying for the copies, he as regional game warden being entitled to the copies. The particulars of the charge alleged that the accused wrote that the sentence passed by the learned magistrate was too light, whereas in fact the accused wrote that:

"In view of the value of the trophy concerned (a leopard skin) the judgment (Shs. 50/- or thirty days) was somewhat lenient."

It is to be noted that the game licence fee payable for hunting a leopard is Shs. 250/-, as stated in the third schedule of the Fauna Conservation Ordinance, Cap. 302, and without wishing to pass judgment on the sentence imposed in Criminal Case No. 727 of 1964, I do not think it would be improper to me to say that, on the face of it, the punishment was somewhat light.

The question arises whether magistrates and judges are sacrosanct and above criticism by the public of whom the accused is a member. Fitzgerald, J. in 1868 in *R. v. Sullivan and Pigott* (2) in his address to the grand jury (11 Cox C.C. at p. 44) said:

"Every man is free to write as he thinks fit, but he is responsible to the law for what he writes; he is not, under the pretences of freedom, to invade the rights of the community, or to violate the constitution, or to promote insurrection, or endanger the public peace, or create discontent, or bring justice into contempt, or embarrass its functions. In dealing with the case before me, I will tell you that political or party writing, when confined within proper and lawful limits, is not only justifiable, but is protected for the public good, and such writings are to be regarded in a free and liberal spirit. A writer may criticise or censure the conduct of the servants of the Crown or the acts of the Government – he can do it freely and liberally, but it must be without malignity, and not imputing corrupt or malicious motives; with the same motives a writer may freely criticise the proceedings of courts of justice and of individual judges – nay, he is invited to do so, and to do so in a free and fair and liberal spirit. The law does not seek to put any narrow construction on the expressions used, and only interferes when plainly and deliberately the limits are passed of frank and candid and honest discussion."

Later on, in charging the jury in *R. v. Sullivan and Pigott* (2) (11 Cox C.C. at p. 53), the learned judge said, when referring to what a journalist may do:

"... the public press is invited to consider the proceedings of courts of justice for, like every other human tribunal, courts of justice are fallible and liable to err. Justice demands that the errors of courts of justice shall be pointed out, and all this is within the province of a public journal. But this course should be carried out with calm and temperate language. The man who criticises the conduct of the Government ought not to impute improper motives, and though he may point out that there is bad administration of justice, yet he should not use language that would indicate contempt of the laws of the land."

Certainly Fitzgerald, J. did not consider himself beyond or above criticism.

In *McLeod v. St. Aubyn* (3), Lord Morris said ([1899] A.C. at p. 561):

“Committal for contempt of court is a weapon to be used sparingly, and always with reference to the interests of the administration of justice. Hence, when a trial has taken place and the case is over, the judge or the jury are given over to criticism.”

The following year in *R. v. Gray* (4), Lord Russell of Killowen, C.J. said ([1900] 2 Q.B. at p. 40):

“Judge and courts are alike open to criticism and if reasonable argument or expostulation is offered against any judicial act as contrary to law or the public good, no court could or would treat that as contempt of court. The law ought not to be astute in such cases to criticise adversely what under such circumstances and with such an object is published; but it is to be remembered that in this matter the liberty of the press is no greater and no less than the liberty of every subject of the Queen.”

In more recent times, reference was made to the above two cases in *Ambard v. The Attorney General of Trinidad and Tobago* (5). The judgment in this case was delivered by Lord Atkin, who said ([1936] 1 All E.R. at p. 709):

“But whether the authority and position of an individual judge or the due administration of justice is concerned, no wrong is committed by any member of the public who exercises the ordinary right of criticising in good faith in private or public the public act done in the seat of justice. The path of criticism is a public way: the wrong headed are permitted to err therein: provided that members of the public abstain from imputing improper motives to those taking part in the administration of justice, and are genuinely exercising a right of criticism and not acting in malice or attempting to impair the administration of justice, they are immune. Justice is not a cloistered virtue: she must be allowed to suffer the scrutiny and respectful even though outspoken comments of ordinary men.”

The learned judge later on said:

“Some very conscientious judges have thought it their duty to visit particular crimes with exemplary sentences; other equally conscientious have thought it their duty to view the same crimes with leniency. If to say that the human element enters into the awarding of punishment be contempt of court, it is to be feared that few in or out of the profession would escape. If the writer had as journalist said that St. Clair’s sentence was, in his opinion, too severe; and on another occasion that Sherriff’s sentence was too lenient, no complaint could possibly be made; and the offences does not become apparent when the two are contrasted.”

I would finally refer to the East African Court of Appeal decision in *Mullery v. R.* (6), and in particular to p. 143 in which reference is made to Lord Abinger (in *R. v. Faulkner* (7)) who is quoted as follows:

“Do you mean to say that one of the judges has the power to fine a man for sending him a silly or an impudent letter about any matter he has decided? I can only say that I should be very much afraid of exercising it.”

True, the circumstances referred to by Lord Abinger would involve a letter that had not been published to anyone but the judge but it is interesting to note what he thought on the subject, these remarks, however, being mere obiter.

I know I am not capable of improving on the language used in the authorities I have referred to and I respectfully adopt them as being the law which must be applied in this case.

Judges and magistrates are human and therefore fallible and liable to err. The accused believed the learned magistrate had erred on the side of leniency in Criminal Case No. 727 of 1964 and thinking so, it was his duty to pursue the matter and endeavour to have the matter rectified by application to the High Court for enhancement, if the learned state attorney thought it fit and proper.

The letter which gave rise to the contempt proceedings in this case could not be described as being silly, impudent or disrespectful and could not be held to be a publication calculated to lower the reputation and authority of the court in the eyes of the public. The letter was not a contempt of court, as held erroneously by the learned magistrate and there was nothing intemperate in it. The accused believed the sentence imposed in Criminal Case No. 727 of 1964 to be somewhat lenient and wrote to that effect in his letter. Did he write with malignity or did he impute anything sinister in his letter? Certainly not. His letter was brief, frank and honest and whilst he need not have given his reason for wanting the copy of judgment and proceedings, I believe he did so in a sincere and truthful fashion.

There are other aspects which I might have dealt with but I do not consider it necessary to do so and it will suffice to say that having regard to what I have said above the conviction cannot stand. Learned state attorney intimated that he could say very little in support of the conviction but with respect to him nothing could be said. The conviction is accordingly quashed and the sentence set aside.

Appeal allowed. Conviction quashed and sentence set aside.

Paipai Aribu v Uganda [1964] 1 EA 524 (HCU)

Division:	High Court of Uganda at Kampala
Date of judgment:	7 September 1964
Case Number:	135/1964
Before:	Sir Udo Udoma CJ
Sourced by:	LawAfrica

[1] Criminal law – Charge – Assault with intent to steal – Evidence of assault but no proof of intent to steal – Accused convicted as charged – Appeal – Conviction substituted of assault causing actual bodily harm.

Editor's Summary

The complainant, a pedlar, and his driver were travelling in the complainant's car which was loaded with goods, along a narrow road. Approaching a narrow bridge they were ambushed by the appellant with other persons. The driver turned the car round before the appellant was able to open the front door and remove the ignition key. When the appellant tried to drag the complainant from the car the complainant cried out "Do not beat us. Take what you want" but none of the attackers attempted to remove any of the

goods. The driver was hit on the head with a stick but managed to drive the car away while a stone thrown through the car window struck the complainant and injured him. The appellant and one G, were convicted of assault with intent to steal. On appeal.

Held –

- (i) to establish the offence of assault with intent to steal contrary to s. 274 of the Penal Code it is necessary to prove not only the assault but also that the assault was coupled with intent to steal; such intention can generally be presumed from the circumstances attending the assault, the time and place

at which it was committed and the expressions or gestures of the accused at the time;

- (ii) throughout the ambush nothing was done by any of the persons engaged in attacking the complainant and the driver indicating an intention either by gesture or expression on the part of any or all of them to steal any of the goods which were in the car; accordingly there was no intention to steal requisite to constitute an offence under s. 274 of the Penal Code.
- (iii) the evidence proved that the appellant was guilty of an assault causing actual bodily harm and as that was a minor cognate offence to the offence charged, s. 180 and s. 331 of the Criminal Procedure Code would be invoked so as to substitute a finding of guilty of the offence proved instead of that charged.

Appeal allowed. Conviction of assault with intent to steal quashed. Conviction of assault causing actual bodily harm substituted. Sentence reduced.

Cases referred to in judgment

- (1) *Abdalla Katwe and others v. Uganda*, [1964] E.A. 477 (U).
- (2) *R. v. Boden* (1844), 1 Car. & Kir. 396; 174 E.R. 863.
- (3) *R. v. Barnett, O'Brien and Whitney* (1848), 2 Car. & Kir. 594; 174 E.R. 248.

Judgment

Sir Udo Udoma CJ: The appellant, Paipai Aribu Erenesti Akumu was together with another person Getema Musa Ibrahim Damulira convicted in the District Court of Teso sitting at Soroti of an assault with intent to steal contrary to s. 274 of the Penal Code. They were both sentenced to terms of imprisonment, the appellant being sentenced to nine years imprisonment. From that conviction and sentence the appellant alone now appeals. There is no appeal by Getema Musa.

The case of the prosecution in support of the charge may be summarised as follows. On February 6, 1964 Tulsidas Mulji Pabari (PW.1) pedlar, resident at Soroti, after having loaded his Opel car with sundry goods comprising bicycle spares, hosiery, cutlery and clothes travelled by the said car which was then being driven by his driver, Wilfred Siasai (PW.2) from Soroti to Obalanga. The goods were loaded into the back seat of the car while Tulsidas Mulji Pabari (PW.1) sat beside his driver at the front of the car. On their way they called at Tiriri and then to Achuma where some of the goods in the car were sold and the sum of Shs. 150/- realised from the said sales. Thereafter the car drove to Orungo where sales totalling Shs. 800/- also took place. From Orungo the car proceeded to Oblanga. At about 11 a.m. when the car was some seven miles from Orungo two men, one of whom was the appellant, were seen sitting one on either side of the road near to a small bridge with their faces turned towards the car. The road was narrow and the bridge narrower still, the road having been built through a swamp. There were no houses along the road.

As the car approached the bridge two other men emerged from the bush with a big log of wood which they threw across the road by the end of the bridge opposite the car. Thereupon the men who had been sitting by the bridge then got up, and they, together with the two men, who had thrown the log across the road near to the bridge, ran towards the car. The men were armed with sticks. Then some more men emerged from the bush armed with pangas, iron bars and axes. There were therefore altogether seven

armed men including the appellant and Getema Musa confronting the car. Tulsidas Mulji Pabari (PW.1) and Wilfred Siasia (PW.2) became frightened. Tulsidas Mulji Pabari (PW.1) started to cry as he feared that the men would kill him.

On the instruction of Tulsidas Mulji Pabari (PW.1) the driver, Wilfred Siasia (PW.2) reversed the car. He turned the car round towards Orungo. As he did so the men came upon the car. While some of the armed men were standing by the front door of the car near the driver, the appellant, who was then standing by the side of the car where Tulsidas Mulji Pabari (PW.1) was sitting, opened the front door of the car and at once removed the ignition key from the car. The engine of the car did not stop. It was still running as the key was removed straight from the car without it being first turned downwards to switch off the engine.

The appellant then caught Tulsidas Mulji Pabari (PW.1) by the left hand and tried to drag him out of the car. Tulsidas Mulji Pabari (PW.1) held firmly onto the car while the driver, Wilfred Siasia (PW.2) also held him by the right hand, thereby preventing the appellant from dragging Tulsidas Mulji Pabari (PW.1) out of the car. Getema Musa then hit Wilfred Siasia (PW.2) on the head with a stick. As a result Tulsidas Mulji Pabari (PW.1) said to the armed men "Do not beat us". "Take whatever you want." To that remark nobody appeared to pay the least attention.

On the instruction of Tulsidas Mulji Pabari (PW.1) Wilfred Siasia (PW.2) immediately drove away the car. As the car drove off the men began to throw stones at it. One stone hit and broke the glass window of the car and then hit Tulsidas Mulji Pabari (PW.1) on the head, causing him to bleed profusely. The car was however successfully driven away back to Orungo and then finally to Soroti Police Station, arriving there at about 1 p.m., when the incident was reported to the Police. Later both Tulsidas Mulji Pabari (PW.1) and Wilfred Siasia (PW.2) were taken to hospital for examination and treatment. On examining Tulsidas Mulji Pabari (PW.1) Dr. Frederick Grelham Hully (PW.11) found that Tulsidas Mulji Pabari (PW.1) had a lacerated wound on his head one inch long which could have been caused by a stone or stick. He classified the injury as "harm".

Subsequently thereafter the appellant and Getema Musa were arrested and charged as stated above.

At the trial both the appellant and Getema Musa denied the charge and raised the defence of an alibi which the learned trial magistrate considered and, rightly I think, rejected.

On the evidence thus briefly summarised there can be no question that a case of assault occasioning bodily harm had been clearly established. The only question which falls for consideration in this appeal and on which this court was addressed on its invitation by counsel for the respondent, is whether on the evidence an intent on the part of the appellant and Getema Musa to steal from Tulsidas Mulji Pabari (PW.1) and Wilfred Siasia (PW.2) the property enumerated in the charge was established by the prosecution.

Counsel for the respondent submitted that the learned trial magistrate was right in convicting the appellant as charged because, on the evidence, and having regard to the conduct of the appellant and those other persons who were with them, the only reasonable inference to be drawn must be that the purpose of the assault was to steal from Tulsidas Mulji Pabari (PW.1) and Wilfred Siasia (PW.2) either the car with all its contents or only the goods on the back seat of the car. In either case it, was contended, an offence under s. 274 of the Penal Code was committed. In support of this contention the court was referred to a judgment of this court in *Abdalla Katwe and Others v. Uganda* (1).

It will, I think, suffice for the purpose of this appeal to observe that it is unnecessary to give detailed consideration to the judgment in Criminal Appeals Nos. 27-31 of 1964 as certain circumstances therein present are absent in the

instant appeal, and as the facts found in that case were peculiar. In any case this court is not bound by that decision.

The charge against the appellant was laid under s. 274 of the Penal Code. To establish an offence under that section it is necessary to prove by evidence not only the assault but also that the assault was coupled with an intent to steal, the assault being done in furtherance of the real intent – a process in the act of stealing. Proof of the assault alone would not, I think, be sufficient to establish the offence charged.

It is of course true that in law criminal intention can seldom be proved by direct evidence. It is very often a matter of inference to be drawn from the facts and circumstances of each case. It is also true that a criminal intention in a charge under s. 274 of the Penal Code can generally be presumed from the circumstances attending the assault, the time and place in which it was committed and the expressions or gestures of the prisoners at the time of committing the assault.

The circumstances which cannot be ignored in the instant case are that throughout the obstruction of the highway and the assault nothing was done by any of the seven persons engaged in attacking Tulsidas Mulji Pabari (PW.1) and Wilfred Siasia (PW.2) indicating an intention either by gesture or expression on the part of any or all of them to steal any of the goods which were stored on the back seat of the car. On the evidence, the goods were exposed to view. No attempt was made by any of the seven men to break or open the door of the back seat with a view to gaining access to the goods there stored. It is not without significance that there is not a little of evidence suggesting any attempt by the men to pick up any of the goods in the car or even to demand the surrender by Tulsidas Mulji Pabari (PW.1) of either the car or the goods, and yet the learned trial magistrate, without giving consideration to this important issue, found that the case against the accused was proved.

Why, one must ask, should it be presumed that in attacking Tulsidas Mulji Pabari (PW.1) and Wilfred Siasia (PW.2) the intention was only to steal their goods? And why not that the intention was merely to assault them or even murder them? It seems to me clear that from the circumstances and the evidence in this case three probable inferences as to the intent which had motivated the seven men in attacking Tulsidas Mulji Pabari (PW.1) and Wilfred Siasia (PW.2) in the manner in which they did can be drawn, namely:

- (1) an intent to assault Tulsidas Mulji Pabari (PW.1) and Wilfred Siasia (PW.2) simpliciter;
- (2) an intent to assault them with a view to murdering them; and
- (3) an intent to assault them as a prelude or an aid to or a means or in furtherance of theft.

Surely, if the attack was prompted by the intent to steal one would have expected a demand for money or for some other contents of the car to have preceded the attack, or at least some effort to have been made by some members of the gang to reach for the goods in the car. After all only two members of the gang were engaged in attacking at the front of the car.

The contention of counsel that the only reasonable inference to be drawn from the facts and circumstances disclosed by the evidence in the instant case was that the men had attacked Tulsidas Mulji Pabari (PW.1) and Wilfred Siasia (PW.2) with the intent to steal either their car with all its contents or the contents of the car alone is most unconvincing and cannot be sustained. The only property of Tulsidas Mulji Pabari (PW.1) which may be said to have in fact been stolen was, of course, the ignition key, and that would appear not to have been included in the charge as such. Would it really be unreasonable to

suppose that the intention of extracting the ignition key from the car was not really to steal the key as such but to prevent Tulsidas Mulji Pabari (PW.1) and his driver from escaping with the car the better to facilitate their murder?

Having given considerable thought to the issue of the intent requisite to constitute the offence of assault with intent under s. 274 of the Penal Code, I have reached the conclusion that the conviction of the appellant and Getema Musa by the learned trial magistrate was wrong in law. It is obvious from the evidence that the prosecution did not satisfactorily prove the case beyond reasonable doubt. The conviction and sentences cannot therefore be sustained. They must be set aside.

As already observed, the evidence has disclosed a very serious case of assault which cries aloud for punishment. In view of the evidence, it would be contrary to the interests of justice that the appellant and Getema Musa should go unpunished. Although there appears to be some doubt as to whether there is a specific provision in the Criminal Procedure Code to the effect that a person charged with an assault with intent to steal can be convicted of a lesser offence, if proved, I think English precedents may be of assistance.

In *R. v. Boden* (2), the prisoner was indicted for assaulting one Thomas Simcocks with intent to rob him. At the trial it was proved inter alia that the prisoner saw Thomas receive seven sovereigns for a cow which he had sold. He followed him and said "Pay me the eleven sovereigns you owe me" and then knocked him down and put his hand into Thomas's pocket where he had seen the sovereigns placed. He was however prevented from getting the sovereigns out. They both parted. It was held that there was such a semblance of a claim of right that this was not an assault with intent to rob; and further, that the intent to rob being negatived the prisoner must be convicted of an assault under s. 11 of the Statute 1 Vic. Cap. 85. He was so convicted and sentenced to one month imprisonment by Parke, B.

In *R. v. Barnett, O'Brien and Whitney* (3), the three prisoners were charged with having robbed one Samuel Brewerton of a watch and two half sovereigns and beaten him immediately before the robbery. It was proved at the trial that Barnett had knocked down Brewerton as the latter was coming out of a women's house. As a result Brewerton complained that he had missed his watch and that he had been robbed of it. Whitney and O'Brien then said that they would not believe he had been robbed unless they felt his pockets, which they did, and took away his trousers pocket which contained the half sovereigns, after which they left him. Later Barnett assisted him to enter a house to wash his face and mouth as he was bleeding from the mouth.

In addressing the court, it was contended for Barnett that he had nothing to do with the robbery, if robbery there was, and that the assault was an assault quite distinct from any robbery. Creswell, J. in summing up to the jury said:

"If you think that all the three prisoners were concerned in the robbery, you ought to find all of them guilty of it, although the hand of Barnett did not take any of the property; but if you think that Barnett was not concerned in the robbery and that the other two were, you should convict them of the robbery and acquit him altogether, and you ought not to convict him of an assault although he committed one, because it would then be an independent assault unconnected with the robbery. But if you are not satisfied that either of the prisoners committed any robbery you may then find them all guilty of an assault because that is an assault which is included in the charge contained in the present indictment."

The jury found all the prisoners not guilty of robbery but guilty of assault.

A careful examination of the provision of s. 274 of the Penal Code discloses that an assault had formed the basis of the charge against the appellants in this case. It is an element in the offence and is included in the charge in the present case. For, to constitute the offence, two distinct elements are requisite, namely, assault and stealing. On the evidence only the assault aspect has been completely committed.

I think in the circumstances, it is reasonable to invoke the provisions of ss. 180 and 331 (2) of the Criminal Procedure Code, as I am of the view that the offence proved is a minor cognate offence to the offence charged. That being so, I will find the appellant and Getema Musa guilty of an assault causing actual bodily harm contrary to s. 228 of the Penal Code in substitution for the finding made by the learned trial magistrate that the appellant was guilty of assault with intent to steal. I will also reduce the sentence to five years imprisonment in each case. Accordingly the appeal is allowed. The finding, conviction and sentences are set aside. In substitution therefor the appellant and Getema Musa are found guilty of assault causing actual bodily harm contrary to s. 228 of the Penal Code. Each of them is convicted of the said offence and sentenced to five years imprisonment. It has been necessary to consider also the case of Getema Musa, although he did not appeal, as my decision in this appeal must of necessity affect him.

Appeal allowed. Conviction of assault with intent to steal quashed. Conviction of assault causing actual bodily harm substituted. Sentence reduced.

The appellant in person.

For the respondent:

The Director of Public Prosecutions, Uganda

A. K. Korde (State Attorney, Uganda)

G M Daya v Republic
[1964] 1 EA 529 (HCT)

Division:	High Court of Tanganyika at Dar-es-Salaam
Date of judgment:	15 July 1964
Case Number:	251/1964
Before:	Reide J
Sourced by:	LawAfrica

[1] Criminal law – Practice – Appeal – Right of appeal – No right of appeal if accused fined one hundred shillings only – Accused so fined but ordered to pay compensation in addition – Whether appeal competent.

[2] Street traffic – Careless driving – Complainant's opinion given in evidence that accused travelling

at unusual speed – No other evidence of speed – Magistrate's finding that unusual speed constituted careless driving – Whether opinion as to speed sufficient to support conviction.

Editor's Summary

The appellant was convicted of careless driving and was fined Shs. 100/- and ordered to pay Shs. 80/- compensation to a cyclist with whom his car had collided. The appellant had overtaken a cyclist, knocked him down and then swerving to his offside had hit a vehicle coming in the opposite direction. The cyclist's evidence was that the appellant was driving fast and that he knew this because the appellant was unable to control his vehicle after he had hit him. The magistrate found that the appellant was driving at an unusual speed, that his speed caused the accident and that this constituted careless driving. On appeal two points were considered, namely, whether there was a right of appeal in view of s. 313 (2) of the Criminal Procedure Code which provides

that “No appeal shall be allowed in cases in which a subordinate court has passed a sentence of . . . a fine not exceeding one hundred shillings only . . .” and whether the evidence of the cyclist was sufficient to support the conviction.

Held –

- (i) the order for payment of compensation in addition to the fine of Shs. 100/- was sufficient to oust the provisions of s. 313 (2) and allow the court to entertain the appeal;
- (ii) a person cannot be convicted of careless driving when the finding of careless driving is based solely on opinion evidence about his speed; moreover the opinion was reached by faulty reasoning; accordingly the magistrate erred in convicting the appellant.

Appeal allowed. Conviction quashed and sentence set aside. Order for refund of fine and compensation.

Cases referred to in judgment:

- (1) *M. J. Chavde and another v. The City Council of Nairobi* (1954), 27 K.L.R. 174.
- (2) *R. v. Sohanpal*, [1953] 2 T.L.R. (R) 3.
- (3) *Milburn v. R.*, [1954] 2 T.L.R. (R) 27.

Judgment

Reide J: The appellant was convicted of careless driving contrary to s. 47(1)(a) of the Traffic Ordinance. He was fined Shs. 100/- and ordered to pay Shs. 80/- compensation to a cyclist with whom his car collided.

The first question for decision is whether the appellant has a right of appeal. Section 313 (2) of the Criminal Procedure Code provides that:

“No appeal shall be allowed in cases in which a subordinate court has passed a sentence of . . . a fine not exceeding one hundred shillings only . . .”

Section 348 (2) of the Kenya Criminal Procedure Code is similarly worded. The question turns on the meaning of the word “only”. In *M. J. Chavde and another v. The City Council of Nairobi* (1), the appellant was fined Shs. 100/- and ordered to pay Shs. 8/- costs, and in *R. v. Sohanpal* (2), the appellant was fined Shs. 100/- and disqualified from driving a motor vehicle. In both cases the courts held that there was a right of appeal. The ratio decidendi of the decisions was in effect that the word “only” should be construed as if the subsection read “or of fine only not exceeding Shs. 100/-”, that is to say, that an order for payment of costs or for disqualification in addition to the fine itself rendered the judgment appealable. By parity of reasoning I think that an order for payment of Shs. 80/- compensation in addition to the sentence of the Shs. 100/- fine makes the judgment in this case appealable also. It is true that in the Kenya case the court spoke of the order to pay costs as “a penalty forming part of the sentence”, and as so ousting the operation of s. 348 (2), but I do not think that the true test here is, as learned state attorney has suggested, whether the additional order be punitive in character or merely concerned with compensation. The fact that it is additional to the fine is in my view sufficient to oust the provisions of s. 313 (2) and allow this court to entertain the appeal.

I turn to the merits of the appeal. The learned magistrate found that the appellant had overtaken from behind a cyclist who was wheeling his machine on the proper side of the road, knocked him down, swerved to the right and collided with another vehicle coming in the opposite direction. He considered the evidence of the cyclist and that of the appellant. The former said the

appellant was driving fast before the accident, and that he knew that this was so because the appellant was unable to control his vehicle after he had hit him.

The appellant testified that when he approached the cyclist at a speed of about 25 m.p.h. the latter seemed to have “lost control”. He had swerved to avoid hitting him, and in doing so had collided with another vehicle coming in the opposite direction.

If the learned magistrate had made a finding that on the prosecution evidence he was satisfied beyond reasonable doubt that the appellant’s conduct constituted driving without due care and attention, the result of this appeal might have been different, but his finding of fact is concerned only with the question of speed. He said:

“I find as fact that accused was travelling at an unusual speed and that it was his speed that caused the triple accident and I hold that this constitutes careless driving on the part of the accused.”

That can, it appears to me, mean only that the accidents were due to what the court calls “the appellant’s unusual speed” and that speed, whatever it was, constituted careless driving. The evidence of “unusual speed” was that of the cyclist only, and was no more than opinion evidence of a quite unsatisfactory sort. The appellant had approached him from behind and the only reason why he had thought the speed “fast” was that the appellant was unable to control the vehicle after having hit him.

Now it is clear that in such circumstances a driver’s failure to control a vehicle after a collision may afford little evidence of his speed before it. It is to be noted that the driver of the other car, which was facing the appellant’s car, gave no opinion about the appellant’s speed at all. In *Milburn v. R.* (3), it was held that a court cannot convict a person of exceeding the speed limit on pure opinion evidence. By parity of reasoning I find that a court cannot convict a person of careless driving when the finding of careless driving is based solely on opinion evidence about his speed, and is of the sort tendered here, where the opinion was arrived at on quite insufficient data and by a faulty process of reasoning.

Accordingly the appeal is allowed, the conviction quashed and the sentence set aside. The fine and compensation are to be refunded to the appellant.

Appeal allowed. Conviction quashed and sentence set aside. Order for refund of the fine and compensation.

For the appellant:

Sayani & Co. Dar-es-Salaam

N. R. D. Sayani

For the respondent:

The Director of Public Prosecutions Tanganyika

Lutakyamirwa (State Attorney, Tanganyika)

Voi Sisal Estates Limited v Hassan Kassim Lakha
[1964] 1 EA 532 (HCU)

Division: High Court of Uganda at Kampala

Date of judgment: 30 September 1964

Case Number: 580/1963

Before: Sheridan J

Sourced by: LawAfrica

[1] Income tax – Company – Undistributed profits – Shareholder – Profits deemed to have been distributed – Notice of deemed distribution served on company – Shareholder assessed on his proportion of deemed distribution – Election by shareholder – Tax to be paid by company – Shareholder ceasing to be member of company – Cesser prior to notice of deemed distribution and assessment – Agreement by shareholder to pay income tax on profits accrued until shareholder ceased to be a member – Whether company entitled to reimbursement of income tax paid.

Editor's Summary

The plaintiff company sued the defendant, a former shareholder, for the refund of income tax paid by the company on behalf of the defendant following service upon the company of a notice under s. 22 of the East African Income Tax (Management) Act, 1952. The claim arose out of an agreement dated May 31, 1952 made between the company and two main groups of shareholders to divide up the assets of the company by which the first group, which included the defendant, was to form a company to take over and manage part of the assets and to transfer their shareholdings in the plaintiff company to the second group. Clause 9 of the agreement provided that the liability for income tax and other taxes on profits accrued due up to June 30, 1952 should be the joint responsibility of both groups and their members in proportion to their shareholdings. Clause 19 provided that both groups should pay their respective shares of the income tax or any other tax assessed as when the same should become due and payable. In 1953 shares were transferred by members of the first group to the second group but the income tax due for 1952 was not finalised until 1958. As no profits for 1952 were distributed to the shareholders, a notice under s. 22 of the East African Income Tax (Management) Act, 1952 was served on the plaintiff company in April, 1959 ordering that sixty per cent of the computed profits of the company should be deemed to have been distributed to the shareholders. The defendants' share was assessed at Shs. 33,267/- and under s. 22 (4) of the Act he elected that the tax should be paid by the plaintiff company. The tax was paid by the plaintiff company. At the hearing it was submitted for the plaintiff company that the effect of clause 9 was that the deemed dividends taxed in the hands of the shareholders were the responsibility of the original shareholders as well as their share on the additional profits which were assessed but not deemed to be distributed. The defence was that the plaintiff company was negligent in not distributing the profits for 1952 so as to avoid an order under s. 22 of the Act. It was also contended that the purpose of s. 22 is to prevent the avoidance of tax by shareholders and that it does not create a tax due by a company.

Held – Clause 9 referred to profits accruing and the combined effect of clauses 9 and 19 was that the members of the two groups accepted liability for income tax or any other tax on the profits of the company which were assessed under the “deeming” provision and was not limited to tax on the company's income for which the company was liable to tax.

Judgment for the plaintiff company.

Cases referred to in judgment:

- (1) *The Commissioner of Income Tax v. Q. Company*, 1 E.A.T.C. 168.

Judgment

Sheridan J: The plaintiff company claims Shs. 33,267/- representing income tax which it has paid on behalf of the defendant, an ex-shareholder, and a further sum of Shs. 1,148/80 in respect of a payment on his behalf, making a total claim of Shs. 34,415/80.

The claim arises out of a complicated agreement dated May 31, 1952 (Ex. A), made between the company and two main groups of shareholders to divide up the assets of the company, the first group, of which the defendant was a member, to take part of the assets at a valuation and to form a separate company to manage the assets and to transfer their shareholding in the plaintiff company to the second group, the remaining shareholders.

The accounts (Ex. D.) were prepared in agreement between the two groups and the auditors, A.M. Shah. The stocks were computed as at April 30, 1952, and the accounts were made up to June 30, 1952, in accordance with clauses 6 and 7 of the agreement.

In 1953 shares transferred by members of the first group to the second group. They ceased to be shareholders and directors of the company.

Subsequent to the agreement notices of assessment and of additional assessment were issued by the Income Tax Department on the company for the years 1951 and 1952 claiming income tax on the profits of the company. The income tax due for 1952 was not finalized until 1958. No profits were distributed for the period ending June 30, 1952, and on April 9, 1959, the Regional Commissioner of Income Tax served a notice on the company under s. 22 of the East African Income Tax (Management) Act, 1952, ordering that an amount of £175,447, i.e. 60 per cent. of the computed profits of £292,411 should be deemed to have been distributed to the shareholders. The defendant's share was assessed at Shs. 33,267/-. Under s. 22 (4) of the Act he elected that this tax should be paid by the plaintiff company (Ex. J.), and it was paid. The present claim is for repayment of this amount from the defendant as one of the responsible shareholders. It is in the nature of a test action. The company and the second group rely on Clauses 9 and 19 of the agreement (Ex. A), which are in the following terms:

<i>“Clause 9:</i>	It is further agreed and declared that the liabilities of payment of income tax and other taxes (if any) on profits accrued due to the accounting period up to 30th day of June, 1952, shall be the joint responsibility of both the major groups and their members in proportion to their shareholdings
<i>Clause 19:</i>	The company shall call upon the two major groups aforesaid to pay their respective share of the income tax or any other tax assessed by the authority as and when the same shall become due and payable and both the said major groups hereby undertake to forthwith pay the same upon request being made by the company.”

Counsel for the plaintiff company, submits that the effect of Clause 9 is that the deemed dividends taxed in the hands of the shareholders were the responsibility of the original shareholders as well as their share on the additional profits which were assessed but not deemed to be distributed. By a letter dated November 24, 1961 (Ex. B), the defendant's advocates would seem to acknowledge that this was substantially the position, although counsel for the plaintiff company concedes that the acknowledgment was not conclusive. The letter points out that Shs. 764,082/- has been paid by the first group. It denies

that any balance remains due by the defendant to the plaintiff company.

The defence is that the plaintiff company was negligent in not distributing a portion of the profits for 1952 so as to avoid an order under s. 22 of the Act, to which counsel for the plaintiff company replies (1) that the directors did not owe any duty in law except to the present shareholders in deciding what profits to distribute. No breach of any contract between them and the defendant is alleged; (2) that they proceeded on the accounts which were jointly prepared by the two groups; (3) that the agreement provided that prior to the transfer a dividend of Shs. 900,000/-, free of tax, should be declared; and (4) that the agreement is silent as to future dividend policy.

The facts in this case are somewhat similar to *The Commissioner of Income Tax v. Q. Company* (1), where it was held on an election by the taxpayer the defendant company was liable to pay the tax assessed on him. Counsel for the defendant, relies on the decision that the election does not render the company chargeable to tax but that its object is merely to provide machinery for the collection of tax due by a shareholder from the company of which he was a member. The case is authority for saying that the election can be made by a shareholder who has ceased to be a member of the company.

I would be inclined to agree with counsel for the defendant's submission were it not for the wide terms of Clauses 9 and 19. He asks me to limit Clause 9 to the tax which accrued due on the profits for the period up to June 30, 1952, pointing out that profits are "made" and unlike taxes, do not "accrue", I think I must accept Clause 9 as referring to the profits "accruing" however inapt the phrase might be. This is especially so when read in conjunction with Clause 19, which refers to "all other tax assessed by the authority as and when the same shall become due and payable" as the responsibility of the two groups. It is not limited to tax on the company's income for which the company is liable to tax. I confess I do not find the matter easy, and I can see the force of counsel for the respondent's argument that the purpose of s. 22 of the Act is to prevent the avoidance of tax by the shareholders, and it does not create a tax due by the company. But, whatever the position in law, the agreement seems to provide to the contrary. The shareholders, members of the two groups, accepted liability for income or any other tax on the profits of the company which, for 1952, were assessed at some £175,000 under the "deeming" provision. As counsel for the plaintiff put it, "the sale of these shares was on the basis of a valuation which was to be free from tax. The sellers would get a better price if there was an indemnity against tax." Clauses 9 and 19 do, in my opinion, cover the plaintiff's claim. There will be judgment for the plaintiff for Shs. 34,415/80, with interest and costs.

The defendant counterclaimed for an account to be taken and for other relief, although no evidence was called in support of this claim. It has no merits. The accounts have already been finalised, by agreement between the two groups, and they show the position. On balance the defendant is a debtor and not a creditor.

The counterclaim is dismissed with costs.

Judgment for plaintiff company.

For the plaintiff:

Patel & Mehta, Kampala

Bryan O' Donovan Q.C. and A. G. Mehta

For the respondent:

Wilkinson & Hunt, Kampala

Uganda v George Edimu
[1964] 1 EA 535 (HCU)

Division: High Court of Uganda at Jinja
Date of judgment: 5 August 1964
Case Number: 8/1964
Before: Sir Udo Udoma CJ
Sourced by: LawAfrica

[1] Criminal law – Compensation – Award against police – Police held to be the complainant-Meaning of “complainant” – Whether order for compensation against police correct – Criminal Procedure Code, s. 173 (U).

Editor’s Summary

The accused was charged with assaulting one, A., and occasioning actual bodily harm. At the trial A. and one, W., gave evidence but each one of them was found to have lied and the magistrate held that they were utterly unreliable. He held there was no prima facie case made out against the accused, that the case against the accused was false and the charge frivolous and in acquitting the accused ordered the police to pay him Shs. 200/-compensation. The Director of Public Prosecutions thereupon applied for revisional order to set aside the magistrate’s order on the grounds that the magistrate had erred in law in ordering the payment of compensation against the police since, under s. 173 of the Criminal Procedure Code, such an order could only be made against a complainant who had instituted criminal proceedings pursuant to s. 85(1)(c) and (3) *ibid.* and that there was no evidence to show that the charge was frivolous or vexatious within s. 173. It was argued that compensation could only be awarded against any person other than a public prosecutor or a police officer, who had instituted criminal proceedings by making a complaint to a magistrate as provided under s. 85(1)(c) and (3) *ibid.*

Held –

- (i) it would be inaccurate and inappropriate to describe the police, whether as a department or as a single prosecutor, as a “complainant” for the purposes of s. 173 *ibid.*; it would be nearer the mark in the instant case to describe A. as the complainant; however,
- (ii) the word “complainant” need not always be construed as meaning a private prosecutor instituting criminal proceedings pursuant to s. 85(i)(c) and (3) *ibid.*; so to hold would be to give a rather restricted and narrow meaning to the word “complainant” and the result might be contrary to the intention of the legislature;
- (iii) the provisions of s. 85(1)(c) and (3) *ibid.* are intended to apply to a complaint by a private person made directly to a magistrate, who, in such a case, is empowered to take the steps prescribed in s. 85(4) and (5) *ibid.*;

- (iv) the magistrate was wrong in law in ordering the police to pay compensation to the accused as the police were not the complainant in the case;
- (v) on a reasonable view of the evidence it was difficult to hold that the complaint was frivolous and the case against the accused false.

Order made by the magistrate awarding compensation set aside. Compensation, if paid, to be refunded.

Cases referred to in judgment:

- (1) *Uganda v. Mikaire Muzungu*, Uganda High Court Criminal Revision No. 87 of 1963 (unreported).

Judgment

Sir Udo Udoma CJ: This is an application by the Director of Public Prosecutions for a Revisional Order by this court under s. 341(1)(b)

of the Criminal Procedure Code, reversing the order of the resident magistrate, Mbale district court, in which, in dismissing the case and acquitting the accused person (hereinafter to be referred to as the respondent), he had ordered the police to pay to the respondent a sum of Shs. 200/- by way of compensation.

The learned trial magistrate had made that order for compensation because, at the close of the case for the prosecution, he had come to the conclusion:

- (1) that there was no prima facie case made out against the respondent;
- (2) that there was no justification for the prosecution of the respondent;
- (3) that the case against the respondent was false;
- (4) that the complaint against the respondent was frivolous and;
- (5) that it was a fit case in which the respondent ought to be compensated for his trouble, the respondent being a policeman.

The ground upon which it is sought to have the order set aside is that the learned trial magistrate erred in law:

- (1) in making the order for the payment of compensation against the Police since, under s. 173 of the Criminal Procedure Code, such an order can only be made against a complainant who had instituted criminal proceedings pursuant to s. 85(1)(c) and (3) of the Criminal Procedure Code; and
- (2) in forming the opinion that the charge was frivolous or vexatious within the meaning of s. 173 of the Criminal Procedure Code in the absence of any evidence to that effect.

Counsel in his arguments for the applicant, submitted that in awarding compensation to the respondent on the ground that the charge was frivolous the learned trial magistrate was acting under s. 173 of the Criminal Procedure Code, that being the only section of the Code which empowers the court to award compensation other than costs on dismissing a charge which, in its opinion, is frivolous or vexatious. That being so, counsel contended that the learned trial magistrate was wrong in law to have awarded compensation against the police since under s. 173 of the Criminal Procedure Code such compensation could only be awarded against any person other than a public prosecutor, or a police officer, who has instituted criminal proceedings by making a complaint to a magistrate as provided under s. 85(1)(c) and (3) of the Criminal Procedure Code. In other words, a magistrate can only, under s. 173 of the Criminal Procedure Code, award compensation against a private complainant where such a complaint is made directly to the magistrate by the private complainant.

In support of this submission counsel for the applicant cited and relied on an unreported decision of Fuad, J. in *Uganda v. Mikaire Muzungu* (1).

Counsel for the applicant also submitted that the learned trial magistrate was wrong in law to have held that the charge was frivolous, as on the evidence there was no question that the victim, Aloysio Kasozi Kirimba Makasa (PW.1), was in fact assaulted, the only issue in dispute being as to the identity of his assailant.

I propose now to consider these submissions. Since the decision of the learned trial magistrate that the charge was frivolous has been seriously questioned, for the better appreciation of the case it will, I think, be convenient at this stage to summarise the evidence that was before the learned trial magistrate at the trial.

The charge against the respondent was an assault occasioning actual bodily harm. The case of the

prosecution in support of the charge was that on March 11, 1963, Aloyisio Kasozi Kirimwa Mukasa (PW.1), was at a petrol station in Mbale Township for the purpose of filling his car with petrol. He parked his

car there. The respondent approached him. He spoke to him in Kiswahili. In reply Aloyisio Kasozi Kirimbwa Mukasa (PW.1), asked the respondent whether he knew Luganda. Thereupon the accused, who was then in police uniform, ordered Aloyisio Kasozi Kirimbwa Mukasa (PW.1) to go to the police station, which the latter did.

At the police station the respondent ordered Aloyisio Kasozi Kirimbwa Mukasa (PW.1), behind the police station counter, which again the latter obeyed. There and then the respondent boxed and kicked Aloyisio Kasozi Kirimbwa (PW.1), while another policeman held him down on the ground. Later Aloyisio Kasozi Kirimbwa Mukasa (PW.1) reported the matter to a European Police Officer. As a result he was medically examined by Dr. Vijendra Desai (PW.3), who classified the injuries found on the body of Aloyisio Kasozi Kirimbwa Mukasa (PW.1) as harm.

The evidence given by Aloyisio Kasozi Kirimbwa Mukasa (PW.1) was somewhat corroborated by Alexander Wayo (PW.2), who testified that he was himself in police custody at Mbale police station at the material time, and that he saw what happened to Aloyisio Kasozi Kirimbwa Mukasa (PW.1).

Under cross-examination, however, both Aloyisio Kasozi Kirimbwa Mukasa (PW.1) and Alexander Wayo (PW.2) admitted that their evidence before the court was different from their respective statements to the police in certain material particulars. In particular, Aloyisio Kasozi Kirimbwa Mukasa (PW.1), denied having given in his statement to the police the number of the police officer who had assaulted him as 1609, whereas, in fact, he did so; and Alexander Wayo (PW.2), admitted having lied to the court in his evidence. Thereupon the learned trial magistrate found that the prosecution witnesses were utterly unreliable.

He held that no prima facie case had been made out against the respondent, and dismissed the charge, and acquitted and discharged the respondent. Against that ruling and the order of acquittal there has been no complaint.

The decision of the learned trial magistrate that the complaint against the respondent was frivolous has, however, been seriously challenged, as already stated above, and may now be considered. On a reasonable view of the evidence it is difficult to hold that the complaint against the respondent was frivolous. There was no doubt that Aloyisio Kasozi Kirimbwa Mukasa (PW.1) did suffer injuries classified by Dr. Vijendra Desai (PW.3) as harm. It was not suggested at the trial that the injuries were self-inflicted.

The learned trial magistrate would appear to have overlooked the fact that the witnesses were testifying in January 1964 of an incident which had taken place since March 11, 1963 – almost a year previously. Because witnesses told lies it does not necessarily mean that the charge against the respondent was frivolous. It may well be that the trial had taken the turn it did because investigation by the police left a good deal to be desired. It is a matter for surprise that no identification parade was held by the police as the matter turned on the identity of the assailant of Aloyisio Kasozi Kirimbwa Mukasa (PW.1).

Be that as it may, I am inclined to accept, and do accept, the submission by Counsel for the applicant that in so far as there was ample evidence of assault, the mere fact that Aloyisio Kasozi Kirimbwa Mukasa (PW.1), failed to identify the respondent as his assailant was not sufficient to justify the learned trial magistrate in holding that the complaint was frivolous and the case against him false.

I turn now to consider the more serious complaint by the applicant in terms of the submission by

counsel for the applicant, namely, that the learned trial magistrate had no power under s. 173 of the Criminal Procedure Code to have

ordered the police to pay compensation to the respondent. This must run solely on the strict construction of the provisions of s. 173 and other relevant sections of the Criminal Procedure Code, and the meaning to be attached to the word “complainant” which, in my view, is the key word in s. 173 of the Criminal Procedure Code.

Unhappily the word “complainant” has not been defined either by the Penal Code or the Criminal Procedure Code, although the word “complaint” is defined under s. 2 of the Criminal Procedure Code as meaning “an allegation that some person known or unknown has committed or is guilty of an offence”.

The question for determination by the court would appear to be this: Would it be accurate to describe the police department, or the Inspector General of Police, or the Commissioner of Police, or a police inspector, or a public prosecutor, or the state, as a “complainant” for the purposes of the provisions of s. 173 of the Criminal Procedure Code? This seems to me doubtful. An accurate answer to this important question is, however, essential having regard to the fact that by awarding compensation against the police in the instant case, the learned trial magistrate was in reality making his order against the State since such compensation must ultimately be paid by the State; and, in default, such payment may be enforced in accordance with the provisions of s. 175 of the Criminal Procedure Code, either by distress or by imprisonment as the case may be.

As already indicated, I am inclined to the view that it would be inaccurate and inappropriate to describe the police, whether as a department or a single prosecutor as a “complainant” for the purpose of the provisions of s. 173 of the Criminal Procedure Code. It would, I think, be nearer the mark to describe Aloysio Kasozi Kirimwa Mukasa (PW.1), in the instant case as the complainant. For the police only acted as a result of his complaint to them. He it was who alleged that the respondent had committed the offence of assaulting him to the extent of causing him actual bodily harm. He it was also who had set the law in motion, and if any injury has been suffered by the respondent, surely it ought to be he who had set the law in motion, that is to say, the complainant who would compensate him for his injury just as in the case of malicious prosecution.

I have been referred to the learned decision of Fuad, J. in *Uganda v. Mikaire Muzungu* (1), already mentioned, which which decision I respectfully agree, although for a different reason. I have noted carefully the interesting historical exposition by Fuad, J. of the law prior to the enactment of the provisions of s. 85 of the Criminal Procedure Code. Fuad, J. has stated that prior to that enactment, the only method of instituting criminal proceedings, I take it before the magistrate, was to lay a complaint (unless the accused person had been arrested without a warrant).

That method, if I may add, was not dissimilar to one of the methods of instituting Criminal Proceedings before a magistrate prescribed by the present Criminal Procedure Act of Nigeria. But there the Criminal Procedure Act itself defines complainant as including “any informant or prosecutor in any case relating to a summary conviction offence”. That definition is a wide one although limited to summary conviction offence, but it cannot be said to include the state.

I find myself in some difficulty, however, over the view that the word “complainant” in s. 173 of the Criminal Procedure Code must always be referable, and only referable, to the provisions of s. 85(1)(c) and (3) of the Criminal Procedure Code, wherein the modes of instituting criminal proceedings are prescribed. Section 173 of the Code, according to that view, must always be read together with s. 85(1)(c) and (3) of the Code for the purpose of ascertaining who a complainant is in any given case. I do not agree. For, if that was the

intention of the legislature, it has not been so expressed, and one must wonder why it was not so expressed. Again, if that view were right, one would have expected the provisions of s. 173 of the Code to be made subject to the provisions of s. 85(1)(c) and (3) of the Code, or for the word “complainant” to be clearly defined by the Code so as to restrict its meaning.

Could it be that the omission was due to a defect in draftsmanship? That, to my mind, is doubtful and is nothing more than an idle speculation. There is no evidence that s. 173 of the Criminal Procedure Code was enacted contemporaneously with or subsequent to s. 85 of the Code.

Furthermore, there are other sections of the Criminal Procedure Code in which the word “complainant” is freely used. For instance, in Part VI of the Code, which is headed: “Procedure in Trials before Subordination Courts – Provisions Relating to the Hearing and Determination of Cases”, we find the word “complainant” occurring again and again, and in particular in ss. 202, 203, 204 and 206, etc. etc. I do not agree that in each case the word “complaint” must always be construed as meaning a private person instituting criminal proceedings pursuant to s. 85(1)(c) and (3) of the Code. In my opinion, to so hold would be to give a rather restricted and narrow meaning to the word “complainant”. The result might be contrary to the intention of the legislature. –

The view I take is that s. 173 of the Code is sufficiently widely worded to cover every criminal case dismissed by the court. The provisions are in the following terms:

“173. If on the dismissal of any case any court shall be of opinion that the charge was frivolous or vexatious, such court may order the complainant to pay the accused person a reasonable sum as compensation for the trouble and expense to which such person may have been put by reason of such charge in addition to his costs.”

In construing these provisions, I think emphasis should be laid on the phrases “any case” and “any court”, which phrases must attract a wide interpretation. These provisions are very wide indeed, and, in my view, would cover any and every case, however and by whomsoever instituted, which is dismissed by any court and not only cases instituted in accordance with the provisions of s. 85(1)(c) and (3) of the Code.

The provisions of s. 85(1)(c) and (3) of the Code are intended to apply, I hold, to complaint by a private person made directly to a magistrate, who, in such a case, is empowered to take the steps prescribed in s. 85(4) and (5) of the Code.

On a careful consideration of the whole of the circumstances of the instant case, and adverting to the meaning which I have indicated should be given to the word “complainant” in s. 173 of the Criminal Procedure Code, I have come to the conclusion that the learned trial magistrate was wrong in law to have ordered the police to pay to the respondent the sum of Shs. 200/- by way of compensation. The police were not the complainant in the case. They prosecuted the respondent as was their duty on the complaint made to them by Aloyisio Kasozi Kiringbwa Mukasa (PW.1).

The order made by the learned trial magistrate awarding compensation to the respondent is therefore set aside. It is ordered that if the compensation has been paid, the same be refunded forthwith. Court below to carry out this order.

Order made by the magistrate awarding compensation set aside. Compensation, if paid, to be refunded.

For the applicant:

L. Sebalu (State Attorney, Uganda)

The accused in person.

Howard and Company (Africa) Limited v Burton
[1964] 1 EA 540 (CAN)

Division: Court of Appeal at Nairobi
Date of judgment: 28 August 1964
Case Number: 65/1962
Before: Sir Samuel Quashie-Idun, Sir Daniel Crawshaw and Crabbe JJA
Sourced by: LawAfrica
Appeal from: The Supreme Court of Kenya – Edmonds, J.

[1] Contract – Frustration – Agreement with caterer to supply meals to contractors’ labour force – Deduction from wages by contractors for meals provided – Refusal by labour force to accept meals – Refusal accepted by contractors – Subsequently no demand for meals – Whether catering contract frustrated – Whether frustration induced by contractors – Duty of contractors to caterer.

Editor’s Summary

In 1959 the appellants, an engineering company, were awarded a contract by the War Office in England to build and complete by February 1962, a military camp. They expected to employ up to 2,500 Africans for their labour force at the peak of the building programme and, in the interests of their general health, they decided to provide a good lunch for these employees and to make a deduction of 60 cents from their wages. This was embodied in the terms of agreement with the men and the appellants, who had obtained a tender from the respondent, made a contract with him whereby the latter was to supply these meals at a cost of 75 cents per meal and for the European staff at Sh. 4/- per meal. In January 1960 the African labour refused the meals for about one week but the appellants made payment to the respondent in respect thereof. On March 16, the whole labour force came out on strike. The strike ended on April 8, and on April 30, new terms were agreed between the appellants and the men, one of which was that there should be no compulsory deduction from wages for meals supplied. Meals were to be available as before for those who wanted them, but deduction from wages was to be made only if they were taken. The result was that the demand for such meals was virtually nil. It was the respondent’s contention that the refusal of the appellants to accept meals for the whole labour force constituted a breach of the catering contract whereas the appellants denied any liability to the respondent in respect of any meals not actually taken. The respondent thereupon brought an action for damages for breach of contract on the basis of loss of catering profit. He relied on a contract partly oral and partly in writing and alleged that it was agreed, *inter alia*, that the appellants would grant the respondent the sole concession to fulfil their catering requirements for the African and European employees on the site, that the respondent would supply midday meals to the appellants’ entire African labour force averaging between 2,000 and 2,500 meals per day and from 80 to 100 meals per day to the European staff and that the said agreement would be for 2 1/2 years, being the term by which the project would be completed. The appellants in their defence

denied that any part of the agreement was oral and stated that it was an express term “that payment would be made for the agreed number of meals served”, that no “average or any number of meals to be taken was guaranteed” or agreed, or that the agreement would be for 2 1/2 years or any stated period, that the respondent was not prevented from providing meals as agreed, that there was no breach of the agreement and that “when the African employees returned to work after the said strike they refused to accept a mid-day meal as a compulsory part of their service emoluments and that the appellants were obliged to accept this refusal as a term of settlement of the dispute. They also alleged that the agreement in so far as it related to the African employees was subject to a term necessarily

implied by law that the employees would be and remain willing to accept a midday meal as part of their emoluments. In giving judgment for the respondent, the trial judge decided, *inter alia*, that the agreement reached, so far as African catering was concerned, was that the respondent was to supply a daily mid-day meal for the entire labour force as it existed from day to day, for the entire term then to run of the appellants' contract with the War Office. He also held that the respondent could not carry out his contract if the compulsory daily meal was withdrawn by the appellants or if the subject matter, on the continued existence of which the respondent's performance of the contract depended, was destroyed by the appellants. As to the plea of the appellants that the contract was frustrated by the refusal of the men to eat the meals he further held that this plea was not open to the appellants as they had themselves agreed to the demand of their labour force to dispense with contractual meals. On appeal the arguments for the appellants included that the judge was wrong to hold that there was no implied term that the contract was dependent on the willingness of the labour force to accept the meals provided or that the contract was not frustrated or that there was a breach of contract. The appellants also argued that their contractual obligations were only to pay for meals actually served and that they were not in breach of the contract since they did nothing to defeat the contract.

Held –

- (i) the basis for the tender was the express understanding between the parties that the appellants would be required to supply throughout the whole term of the appellants' contract with the War Office a number of meals per day commensurate with the number of men employed on the site;
- (ii) any reference to a "specified number" of meals clearly meant, as the judge held, the number which might vary from day to day, which could be readily ascertained;
- (iii) the appellants had a duty to the respondent to attempt such reasonable solution of the labour dispute as would retain to the respondent the benefit of his contract with them;
- (iv) the judge misdirected himself that the onus lay on the appellants to prove that frustration had not occurred through their fault; however, it was clear that the judge would have come to the same conclusion as he did even if this misdirection had not occurred;
- (v) the judge was right in finding that the appellants were in breach of their agreement with the respondent.

Appeal dismissed. Case remitted to Supreme Court for assessment of damages.

Cases referred to in judgment:

- (1) *Rhodes v. Forwood* (1876), 1 App. Cas. 256.
- (2) *Martin-Baker Aircraft Co. Ltd. v. Canadian Flight Equipment Ltd.*, [1955] 2 All E.R. 722.
- (3) *Alimahomed Osman v. Ngoni-Matengo Co-operative Marketing Union Ltd.*, [1962] E.A. 1 (C.A.).
- (4) *Hamlyn & Co. v. Wood & Co.*, [1891] 2 Q.B. 488.
- (5) *Luxor (Eastbourne) Ltd. v. Cooper*, [1941] A.C. 108; [1941] 1 All E.R. 33.
- (6) *Oscar Chess Ltd. v. Williams*, [1957] 1 All E.R. 325.
- (7) *Parshotam Das v. Batala Municipality*, [1949] A.I.R. E.P. 301.

(8) *Turner v. Goldsmith*, [1891] 1 Q.B. 544.

(9) *Constantine Steamship Line Ltd. v. Imperial Smelting Corporation Ltd.*, [1942] A.C. 154.

(10) *Maritime National Fish Ltd. v. Ocean Trawlers Ltd.*, [1935] A.C. 524; [1935] All E.R. Rep. 86.

- (11) *Taylor v. Caldwell* (1863), 3 B. & S. 826; 122 E.R. 309.
- (12) *Davis Contractors Ltd. v. Fareham Urban District Council*, [1956] 2 All E.R. 145; [1956] 3 W.L.R. 37.
- (13) *British Movietonews Ltd. v. London & District Cinemas Ltd.*, [1951] 2 All E.R. 617.
- (14) *Stirling v. Maitland* (1864), 34 L.J. Q.B. 1; 5 B. & S. 840.
- (15) *Bush v. Whitehaven Town and Harbour Trustees* (1888), 52 J.P. 392.
- (16) *Jackson v. The Union Marine Insurance Co. Ltd.* (1874), L.R. 10; 8 C.P. 125; (1873), L.R. 8 C.P. 582.
- (17) *Heilbut Symons & Co. v. Buckleton*, [1913] A.C. 30; [1912] All E.R. Rep. 83.
- (18) *Redmond v. Dainton*, [1920] 2 K.B. 256.
- (19) *Paradine v. Jane* (1646), Aleyn 26.
- (20) *Sargent & Sons v. Paterson & Co.* (1923), 129 L.T. 471.
- (21) *Hangkam Kwintong Woo v. Liu Lan Fong*, [1951] A.C. 707; [1951] 2 All E.R. 567.
- (22) *Tamplin Steamship Co. Ltd. v. Anglo American Petroleum Products Co. Ltd.*, [1916] A.C. 397.
- (23) *Denny, Mott & Dickson Ltd. v. Fraser & Co. Ltd.*, [1944] A.C. 265; [1944] 1 All E.R. 678.
- (24) *Ocean Tramp Tankers Corporation v. V/O Sovfracht*, [1964] 1 All E.R. 161.
- (25) *Hongkong Fir Shipping Co. Ltd. v. Kawasaki Kisen Kaisha Ltd.*, [1962] 1 All E.R. 474.
- (26) *Bank Line Ltd. v. Arthur Capel & Co.*, [1919] A.C. 435; [1918] All E.R. Rep. 504.

The following judgments were read:

Judgment

Sir Daniel Crawshaw JA: This is an appeal by the defendants in the suit against the judgment of the lower court ordering the appellants to pay to the plaintiff-respondent damages for breach of contract to be assessed on the basis of loss of catering profit in relation to the supply of meals by the respondent to African labourers working for the appellants. The respondent in his plaint made other claims also, but these were disallowed and there is no cross-appeal in respect thereof.

The suit arose out of a contract under which the respondent agreed to supply midday meals to the appellants' African workmen, and also to the European staff, and also to provide shops on the site for the use of the workmen. The appellants are an engineering company and in 1959 had been awarded a contract by the War Office in England to build a military camp at Kahawa, near Nairobi, the work to be completed by February, 1962. The appellants anticipated employing a labour force which according to Mr. Styche, an employee of the appellants, would be likely to amount to 2,500 and according to Mr. Steffell, the chief accountant and office manager of the appellants, to 2,000, although in fact at one time it amounted to 3,000; these estimates were for the peak period of the building programme, with fewer in the earlier and later stages. Owing to the state of emergency which had existed in Kenya by reason of the political conditions, the appellants were doubtful of the general health at that time of the working

community from which their labour would be recruited and decided that it would be in the interest of all concerned if they provided a good lunch for the African employees, in respect of which a deduction of 60 cents would be made from their wages. This was embodied in the terms of agreement with the men, and the appellants entered into a contract with the respondent whereby the respondent would supply the meals at a cost of 75 cents

per meal. In January, 1960, the African labour refused the meals over a period of about one week, and the appellants made payment to the respondent in respect thereof. On March 16 the whole labour force came out on strike; we were informed that the reasons were various, in part political and also due to bad relations with the appellants. It ended on April 8, and on April 30, new terms were agreed between the appellants and the men. One of the terms; was that there should be no compulsory deduction from wages for meals supplied; meals would be available as before for those who wanted them, but only if and to the extent they were taken would a deduction from wages be made. In fact the demand for such meals was virtually nil. The appellants denied any liability to the respondent in respect of any meals not actually taken. The respondent maintains that the refusal of the appellants to accept meals for the whole labour force constituted a breach of contract.

It is necessary to consider what the terms of the contract really were and, if there was an apparent breach, whether the appellant can claim frustration. The plaintiff alleged that in pursuance of discussions between the respondent, first with Mr. Styche and later with Mr. Steffell, between July and September, 1959, the contract, partly oral and partly in writing was entered into, in which it was agreed:

- “(i) That the defendants would grant to the plaintiff the sole concession to fulfil the defendant’s catering requirements for its African and European Employees on the site at Kahawa aforesaid;
- (ii) That the plaintiff would supply midday meals to the defendants’ entire African labour force averaging between 2,000 and 2,500 meals per day at the price of 75 cents (increased on the 27th November, 1959, to 80 cents) per meal, and from 80 to 100 meals per day to the European staff at the price of Sh. 4/- per head per day.
- (iii) That the plaintiff would provide (inter alia) such facilities, buildings, staff, labour utensils, and equipment as might be necessary to cater completely for the said African labour force and for the said European catering requirements;
- (iv) That the said catering facilities for the African labour would start on the 27th October, 1959 (subsequently amended to the 2nd November, 1959) and for the said European staff on or about the 2nd December, 1959;
- (v) That the defendants would lease to the plaintiff 3 (three) shops situated in the Labour Camp at £25 (Shillings 500/-) per month and would grant to the plaintiff the sole concession to operate shops in the said Camp;
- (vi) That the said Agreement would be for a period of 2 1/2 years, being the period estimated to complete the defendant’s construction of the Kahawa Military Cantonment;”

The plaintiff further stated that in pursuance of the agreement the respondent “provided buildings, utensils, furniture and equipment necessary for carrying out the said catering requirements, at a cost to him of Shs. 88,702/50”. On November 30, 1960, the appellants purchased these from the respondent for Shs. 20,180/-. The respondent claims inter alia for capital loss and loss of profits.

On further particulars being sought by the appellants, the respondents said, inter alia:

- “(c) in or about August, at a date not remembered, the plaintiff approached Mr. J. Styche, a representative of the defendant, and at that meeting, after the plaintiff had informed Mr. Styche that he was interested in

catering for the period of the contract, Mr. Styche informed the plaintiff that the defendant required catering facilities for Europeans and that a tender should be made on the basis that the caterer would have to supply European meals to approximately 80 to 100 persons, and also that catering facilities for Africans would be required and that the average number to be served daily would be between 2,000 to 2,500 during the continuance of the contract, and that it was estimated that the contract would run for approximately 30 months.

- (e) As a result of the foregoing discussion a Tender was made on the 26th day of September, 1959, and at a subsequent meeting Mr. Steffell, the representative of the defendant Company, had taken over from Mr. Styche and requested the plaintiff to reduce his price and quote one price for a meal per head of the African labour. As a result of this discussion the plaintiff, by letter dated the 15th day of October, 1959, amended his Tender and agreed that the price per meal per African would be in the sum of 75 cents. That as a result of this letter of the 15th October, 1959, final agreement between the parties was entered into in accordance with the written contract."

The learned judge said that the documents which constituted the terms of the agreement, apart from the oral terms alleged by the respondent, were the respondent's tender dated September 26, 1959, his letter of October 15, 1959, and the appellants' letters of October 21 and 24 and November 17 and 27, 1959.

In their written statement of defence the appellants denied that any part of the agreement was oral, and so far as the African labour was concerned, relied particularly on the letter of November 17, as amended by the letter of November 27. The defence stated that only Steffell and not Styche had authority to negotiate the contract; that it was an express term "that payment would be made for the agreed number of meals served"; that no "average or any number of meals to be taken was guaranteed" or agreed or that the agreement would be for a period of 2 1/2 years or any stated period; that the respondent was not prevented from providing meals as agreed; that there was no breach of the agreement; and that, "when the African employees returned to work after the said strike they refused to accept a midday meal as a compulsory part of their service emoluments and the defendant was obliged to accept this refusal as a term of settlement of the dispute. Counsel for the appellants has said that he does not seriously quarrel with the judge's finding that the terms of the contract were not exclusively contained in what was written. He further concedes that the contract was for the period of the contract with the War Office.

Of the documents on the record there is a letter dated August 19, 1959, from the respondent to Styche in which the respondent refers to a conversation he had had with Styche as a result of which he felt he had "a fair grasp of the requirements" of the company, and made certain preliminary proposals, and also confirmed that he was prepared to cater for the European meals "on a strictly non-profit basis". On September 26, he submitted to the appellants a formal tender covering African and European meals and the provision of shops; his price quotation for Africans was on a sliding scale according to their number at any time. In his letter of October 15 he set out "as requested" a revised menu and prices "per meal per capita for the African labour". Steffell in evidence said, this was because he asked him "to quote a fixed price per meal without any reference to numbers". On October 21, Steffell wrote accepting the tender "subject to signing a formal agreement". The agreement in the form of a letter dated October 24 from the appellants to the respondent was duly countersigned by the respondent. This was superseded by a letter of November 17, which was

countersigned by the respondent “Agreed”. The latter was in very similar terms to that of October 24. In both, the appellants confirmed having granted to the respondent “a single concession to fulfil all catering requirements for the company’s African employees” on the terms then set out. The terms contained a provision that the respondent should “provide such adequate facilities as buildings, staff, labour, utensils and equipment as might be necessary to cater completely for the African labour force”, and should “be responsible for instituting and operating a system of taking and recording the number of meals served per day”. Condition 1 (f) of the letter of October 24, read, “payment will be made to you at the rate of 75 cents per head per day”. In the letter of November 17 the following words were added “for the agreed number meals served”. Significance was attached by the appellants to the addition of these words as showing that the contract was for meals actually served and not for the actual number of men working on the site.

After considering the above documents the learned trial judge said:

“In none of this documentary evidence is there any mention of the numbers of African labourers for whom the plaintiff was to cater or the duration of his contract, but it is contended for the plaintiff that, in respect of those terms on which the documents are silent, there is irresistible evidence to justify the conclusion that the parties had orally agreed that the plaintiff was to supply a compulsory meal daily for the entire labour force on the contract site for the duration of the defendant’s contract with the War Department. In his evidence Mr. Styche agreed that an approximate figure of African employees – between 2,000 and 2,500 – and the probable, duration of the catering contract – two and a half years – were given by him to the plaintiff, and that this information was sought by the plaintiff so that he could estimate and submit his tender.”

Steffell gave evidence by affidavit and admitted that when the respondent made the tender he knew the appellants intended giving a compulsory meal per day and that the appellants’ contract with the War Office was for thirty months until the end of February, 1962, and that the number of Africans would be about 2,000. He said: “These indications were given to enable plaintiff and others to tender, but that no written or verbal guarantee was given at all”.

The learned trial judge in his judgment posed two issues in the following terms (we are not in this appeal directly concerned with the European meals or the shops, but only with the African catering) namely: “(a) duration of the contract, (b) specific numbers for African catering”. He then went on to consider whether there were “any specific oral terms of the contract” outside those contained in the documents, and in doing so took into consideration the correspondence between the parties subsequent to the termination of the strike. Of the latter the learned judge said:

“It is noteworthy that throughout this correspondence, apart from its letter of the 19th July, 1960, the defendant company nowhere challenges or disputes the statement by the plaintiff that the terms of the contract were that he was to cater for the defendant company’s entire African labour force for the entire period of the building contract. And throughout his letters to the defendant company, the plaintiff makes no attempt to argue the existence of an implied contract but states what he considers to have been the agreement between them. The statement by the defendant in its letter of 19th July, 1960, that the terms of the concession do not require it to pay plaintiff ‘for any specified minimum number of meals a day’ is ambiguous. It is not the plaintiff’s case that the agreement was that he should be paid a ‘specified’ minimum number of meals per day – his case is that he was to provide a midday meal for the defendant’s entire labour force whether it

numbered on any one day 200 or less or 3,000 or more. To that extent the number of meals to be supplied may perhaps be said to have been specific, but the specification varied and was limited to the total labour force on any one day. It is true that the plaintiff seeks in this pleadings and to some extent in his evidence to maintain that he was given to understand that throughout the period of the contract he could rely on the provision of an average of 2,000 to 2,500 meals a day, yet the substance of his case is clear to me, namely that he was to cater to the extent of one meal a day for the entire labour force in existence from day to day throughout the period of the defendants' contract with the War Department."

The learned trial judge went on to say, "I think the probabilities support the plaintiffs' case", and under seven different heads he gave his reasons for coming to this view. Briefly the reasons were:

- (1) that the respondent was informed of the likely number of Africans who would be working on the site and the duration of the appellants' contract with the War Office, for the purpose of working out his tender;
- (2) that he was informed that the labour was to receive a compulsory midday meal as part of their emoluments;
- (3) that the respondent would have been unlikely to have abandoned his original tender of a sliding scale unless he had been assured of "reasonable overall average of total meals throughout the contract";
- (4) that it would be unlikely that he would have agreed to a non-profit making price for the European meals unless he had been assured of a reasonable profit on the African meals, an assurance which "could only have arisen by virtue of the numbers of meals he was told he could anticipate serving and the duration of the contract";
- (5) the unlikelihood of his incurring the initial capital expenditure of some £5,000 unless assured that the contract was for a meal per day for the whole labour force throughout the period of the appellants' contract with the War Office, the only risk being the early determination of the latter contract, which it was within the express power of that Department to do;
- (6) "There is the failure by the defendant to dispute or challenge the plaintiff's assertion in his letters of 11th May and 27th July, 1960, that the agreement between them was that he was to serve a midday meal to the defendants' entire labour force throughout the period of the defendant's contract with the War Department. On the other hand, there is the statement in the defendant's letter of 30th May, 1960, that 'midday meals are no longer required for a specified number of persons to be paid for through us', but this is tantamount to an admission that the agreement had before that date been for the provision of a midday meal for a specified number."
- (7) "And finally there is the twice-repeated offer by defendant, in its letters of 25th May and 19th June, 1960, to amend or give plaintiff a new contract in respect of the African catering. What meaning can be assigned to the statement in the second letter that 'We are prepared to consider a fresh contract in substitution of the existing concession in which we would for a short period of say one month with the possibility of a further extension at our option be prepared to underwrite your losses where meals taken are less than 500 a day', other than that the defendant acknowledges that there was a contract different in terms from the one for which it now contends in this suit. This offer of a fresh contract was made in response to the plaintiff's complaint in his

letter of 28th June, 1960, when he pointed out that 'Under the system agreed between us and embodied in our contract, I am assured of the regular turnover which can be estimated with reasonable accuracy from the figure of labour employed'. The defendant's answer to that seems to me to be a complete acceptance of the plaintiff's assertion of the terms of his agreement as to the number of meals to be served and the duration of his contract, and the offer to him of a new contract."

The learned judge then went on to say:

"It is my view that these factors which I have just enumerated are the strongest support for the plaintiff's version of the oral terms, outside the written documents, of his contract with the defendant, and I have come to the unhesitating conclusion that the agreement and clear understanding which was reached between him and Mr. Steffell, on behalf of the defendant company, was that so far as the African catering was concerned the plaintiff was to supply a daily midday meal for the entire labour force, as it existed from day to day, for the entire period then to run of the defendant's contract with the War Department."

If wrong as to there being "concensus" between the parties as to the above terms, the learned judge held that they were implied by law. After considering the law in relation to the facts above set out he said that they:

"must, in the nature of the plaintiff's contract with the defendant, necessarily imply the terms for which the plaintiff contends as being the terms of his agreement with the defendant. The plaintiff could not carry out his contract if the compulsory daily meal was withdrawn by the defendant, that is to say, if the subject matter, on the continued existence of which plaintiff's performance of the contract depended, was destroyed by the defendant. And having regard to these factors again, it appears to me that as the very nature and continued existence of the plaintiff's contract depended on the two terms which he alleges, their inclusion as implied terms may be said to be something so obvious that it went without saying."

After dealing with other matters with which I think we need not concern ourselves, the learned trial judge said:

"The next issue is as to whether a term arises by implication of law as pleaded in paragraph 2 (b) of the Amended Defence, which is in these terms:

'2(b) The said agreement in so far as it relates to the Defendant's catering requirements for its African Employees was subject to a term necessarily implied by law that the employees would be and remain willing to accept a midday meal as part of their emoluments.'

I do not think there can be such an implication because the conditions or circumstances upon which the labourers' willingness is based may be very considerably influenced by the act of the defendant company. For instance, it might insist on providing a diet which is not acceptable to them, or it might, as indeed it did, succumb to pressure by the labourers to give them money rather than food. I do not think a term may be implied if there is any participation or act on the part of a contracting party in giving rise to the term sought to be implied. Such a term must arise independently of any act or acts by either party, for, 'if a party enters into an agreement which can only take effect by the continuance of a certain existing state of circumstances there is an implied engagement on his part that he shall do nothing of his own motion to put an end to that state of circumstances.' (8 Halsbury's Laws (3rd Ed.) 124, note (i); *Stirling v. Maitland* (14)). Had the defence sought

to import a term that the contract depended upon the continued existence or availability of a labour force, then it might have done so with some success. The fact that the labourers might prove unwilling to take a compulsory meal as part of their emoluments was a risk upon which the defendants engaged them. The plaintiff was no party to the defendant's contract with its labour as to their terms of service and had no say in any alteration which the defendant might decide to introduce – an alteration which might be to his disadvantage.”

The learned judge went on to consider a plea by the appellant that the contract was frustrated by reason of the refusal of the men to eat the meals and the consequent impossibility of performance of the contract. He held that in the circumstances the plea was not open to the appellant.

In their memorandum of appeal the appellants complained that the judge was wrong to hold: (1) that there were oral terms of the contract, on the ground that evidence thereof was inadmissible; (2) that those terms were in the alternative implied by law; (3) that there was no implied term that the contract was dependent on the labour being prepared to accept the meals provided (or so I read this ground of appeal); (4) that the contract was not frustrated, as the alleged frustration was self-induced; (5) that there was a breach of contract. Ground (1) has not been pursued.

The first question is whether the letter of November 17, 1959, contained express terms relevant to the issues involved in this appeal. The crux of this is, of course, whether the price of the meals to African labour was, as between the respondent and the appellants, to be worked out on the basis of the number of men employed each day by the appellants, or on the basis of meals actually required to be served, and served to those who demanded them. It may be timely here to describe what appears to have been the system before the strike. It seems that the respondent was informed by the labour officer early each day of the number of men engaged, in order that he might prepare the required number of meals. Each man was provided by the appellants with a “tally” which he handed in to the respondent when taking his meal. These tallies were later returned by the respondent to the appellants and the respondent was paid according to their number. Whilst this system was in operation the number of men who took the meals approximated closely to the number of men employed, and if for one reason or another a few of the total number employed did not take the meal and hand in their tally no charge would be made. This procedure it seems was in the interest of simplicity and convenience and I think that it had no real bearing on the real question whether the contract was in principal one for meals served or was related to the number of men employed.

Counsel for the appellants submitted that the respondent's obligation was to supply meals as and when the appellants should require them during the period of the latter's contract with the War Office. This, if I understand counsel's argument correctly, would mean that the respondent should at all times be ready to supply any number of meals up to two thousand per day or more, none, or any number of which up to such number the appellant at any time might require; its requirements being unrelated to the number of men employed, but only to the demand of the appellants. Counsel for the appellants said there were four possible contractual obligations for the judge to consider:

- (a) the form of contract alleged by the respondent and accepted by the judge;
- (b) a guaranteed minimum number of meals per day, but that this has not been canvassed by either party and was rejected by the judge;

- (c) the appellant to pay for every meal actually served as opposed to meals offered for service but not required, and that the appellants undertook not to do anything of their own motion which would prevent the respondent from carrying out his part of the contract;
- (d) the appellants to pay for meals actually served without the undertaking in (c).

Counsel for the appellants submits that (d) is the proper interpretation of the contract, but that if he is held wrong in that he relies on (c) and maintains that the appellants were not in breach of it as they did nothing of their own motion to defeat the contract.

Counsel for the appellants has conceded that in interpreting the contract the surrounding circumstances should be taken into consideration such as the respondent's discussions with Styche, the requirements on which the tender was based, and the understanding between the parties, but submits that these cannot override the terms of the written agreement. It is to be observed that the written agreement of November 17, 1959, commences "With reference to your tender for the above dated September 26th, 1959, and amendments thereto dated 15th October and our subsequent discussions . . .". The tender does not however itself make any reference to the particulars given to the respondent on which the tender was based, nor does the written agreement, apart from the respondent's obligation to provide the necessary facilities. Counsel for the appellants in the lower court in his opening address recognised the circumstances of the tender in the following words:

"We concede, My Lord, that during the course of negotiations, and for the purpose of the tender, the plaintiff was informed of the duration of the main contract as a guide to the period for which the catering sub-contract would be likely to extend; that he was informed of the anticipated numbers for whom catering would be required, because quite clearly, My Lord, it would be out of the question to impose upon anyone the condition that he was required to cater completely for the whole African staff without telling him the numbers likely to be involved. Equally, My Lord, in a contract of this size it would be impossible at the commencement to give an exact number of what the African labour force would run to, but an indication was necessary and an indication was given, and the purpose of that indication was undoubtedly to enable the plaintiff to provide the facilities required, the provision of which was imposed upon him as an obligation, and also to enable him to assess the contract and put in his quotation."

Counsel submitted, however, that the contract was that only "the meals served should be charged for". In addition to the above, the respondent was also informed that the "meal was a term of agreement between the appellants and their labour, and that it was the appellants' policy to provide the men with meals". Counsel for the appellants has not, I think, said anything in conflict with the above. Other tenders were also received by the appellants and presumably they were based on the same information. I do not think anything turns on whether the probable maximum number of labour was given to the respondent as 2,500 or 2,200 per day (in fact, as I have said, at one stage labour exceeded 3,000) for it was an approximate assessment only and does not affect the nature of the claim or of the defence. Much has been made of Mr. Steffel's evidence that before the respondent made his tender he knew that only Steffel had authority to bind the appellants and not Styche. It seems to me that there is no real relevance in this, for Steffel knew (as appears from his affidavit) the basis on which the tender had been called for and submitted.

As to the express terms of the written agreement, Counsel for the appellants

has laid great stress on the words “agreed number of meals served” in para. 1 (f), and submits that the important word is “served” and not “agreed”. The only reference by the learned judge to these words, is, I think, where he refers to the letter of agreement dated November 17 superseding that of October 24. Of the former he said “it contains certain additional conditions but none are germane to the issues between the parties other than the addition of the words ‘for the agreed number of meals served’”. Having said that, he does not refer to them again, and presumably did not therefore consider that they had any substantial bearing on the issues involved. The respondent says the number of meals served is related to the number of men employed. I read the word “agreed” as referable to the preceding para. (e) which provides for the checking and recording by the respondent of the number of meals served, and the right of the applicants to examine and check the records. In comparison with the earlier letter of October 24, it is significant that the addition in para. (f) of the words “agreed number of meals to be served” follows the addition in para. (e) of the provision entitling the appellants to check the records. At the time the agreement of November 17 was written it was not contemplated that labour would refuse to take the meals and it seems to me that in the light thereof, and in their context the words have no bearing on what the contractual position would be if such an event occurred. The words mean no more, in my opinion, than that when meals had been supplied and claimed for, the appellants would pay only on agreeing the accuracy of the numbers.

Counsel for the appellants has challenged the grounds (*supra*) on which the judge based his conclusions as to the probability of the respondent’s version of the contract being correct. He submits that ground one is as consistent with the appellant’s case as with the respondents. Is this so however? The hard fact underlying the contract is to be found in ground two, where under its terms of agreement with its labour the appellants were to supply them with a meal. Counsel for the appellants in the lower court submitted that it never occurred to either the appellants or the respondent that this term would be broken, and the respondent agreed in cross-examination that so far as he was concerned that was so. If it was broken it was not strictly speaking any concern of the respondent as he was not a party to that agreement. It was, however, in my opinion a term which the learned judge was entitled to regard as being significantly consistent with the respondent’s case, in that it was the foundation for the appellants’ giving to the respondent the approximate number of men to be employed. If the appellants did not contemplate the possibility of that agreement being broken, they would not presumably have contemplated any risk if they entered into a contract as described by the respondent. Counsel for the appellants has submitted that as the respondent was prepared to run the risk of the War Office terminating its contract with the appellants (which it seems the War Office could do under the terms of the contract) and the risk of the appellants substantially or wholly sub-contracting, there is no reason to suppose the respondent would not open itself to the further risk of the labour refusing to accept the meals, and in this connection he referred to the case of *Rhodes v. Forwood* (1) to which I shall later again refer, when dealing with the matter of capital expenditure under ground five.

As to ground three, counsel for the appellants refers to Steffel’s explanation in para. 9 of his affidavit for the change in tender from a sliding scale to a fixed overall price per head. I can find nothing in that explanation which helps his argument. On the other hand, in abandoning a higher price for fewer men (as he was told he might expect in the earlier stages of the building contract) it is not, I think, an unfair inference that at least he expected a high average.

As to ground four, the learned judge appears to have overlooked the evidence of the respondent that consideration for providing meals to Europeans on a

non-profit making basis was the concession he was given to open shops. I do not therefore think that weight can be given to this ground.

Taking grounds six and seven next, counsel for the appellants submitted that the learned judge misinterpreted and gave a false value to the letters which passed between the parties following the appellants' new terms with the African labour which followed the strike. The judge had earlier in his judgment considered these letters in more detail and counsel for the appellants dealt with them in like manner. I do not think it necessary to consider the respective arguments in respect of each letter separately. Collectively, however, I am of the opinion that the observations of the learned judge had some justification, although a proposal of new terms did not necessarily recognise consensus as to the existing terms. They were not, however, letters between lawyers and I would hesitate to come to any conclusive finding on them alone. The judge's observation that the appellant did not in that correspondence challenge the respondent's statement that he was to "cater" for the whole labour force for the entire period of the contract has been criticised by counsel for the appellants, who says that it was not in dispute that he was to "cater" but that the obligation to pay was only for meals actually served. I do not think that the learned judge was prepared to read the latter distinction into the correspondence where, for instance, in the respondent's letter of May 11, 1960, he said, "I was to serve a midday meal to your entire African labour force during that period".

Counsel for the appellants objects to the view taken by the learned judge in ground five that the respondent would not have expended "some £5,000 capital outlay" "unless assured" that the contract was as the respondent claimed. The learned judge cited the case of *Martin-Baker Aircraft Co. Ltd. v. Canadian Flight Equipment Co. Ltd.* (2), where McNair, J., in the circumstances of that case found it a forceful argument that no person in their senses would agree to expend money on plant to manufacture another party's products unless he had assurance of some degree of security that orders for those products would continue. The judge held, however, that other factors prevailed and that the other party had a right to terminate the agreement; he observed that it was common for people who put up risk capital to run risks. In *Rhodes v. Forwood* (1) (*supra*) the colliery agreed to engage the plaintiffs as its sole agents in Liverpool for the sale of such coal as the colliery sent to Liverpool over a period of seven years. After three years the colliery was sold with the result that no more coal passed through the agents' hands, and they suffered hardship in that they had incurred capital expenses and could have expected increased commission as time went on. The House of Lords held that there was no implied contract that the colliery would not be sold, Lord Cairns remarking that if the agents were prepared to expend money knowing they ran the risk of obtaining no or little business in certain circumstances, why should it be assumed they would not take the risk in other circumstances such as the sale of the colliery? That case depended, of course, on its own particular facts, one being that the alleged implied undertaking not to sell the colliery would be inconsistent with an express provision in the contract enabling it to be determined by either party in certain circumstances. In *Alimahomed Osman v. Ngoni-Matengo Co-operative Marketing Union Limited* (3), the appellant had agreed for a period of three years to provide transport for the carriage of the Union's products. Before the expiration of the contractual period, the Union arranged its marketing in such a way that it was not required to supply transport with the result that the appellant was deprived of the opportunity of earning remuneration in spite of the condition under the contract that he should always have transport and staff available for use by the Union. The Privy Council observed that the appellant's capital had to be invested in the Union's needs, and that the Union's interpretation of the contract would be one-sided and unjust. For the purpose of interpreting

the contract with which we are concerned, there is not really much assistance to be obtained from looking at the particular circumstances of other cases except so far as they point to the principles to be applied, (a view also expressed by Lord Esher when considering implied stipulations in *Hamlyn & Co. v. Wood & Co.* (4)). I do not think that the learned judge overlooked those principles; it is not always easy to apply them correctly, for implications are by their nature dependent on the conduct of parties and the general circumstances, which may not be decisive either way. I think he was entitled to regard the respondent's interpretation of the contract as being, to some extent anyway, supported by the requirements that he should make a very substantial initial outlay of capital and continue thereafter to maintain facilities and staff for catering for what at any time might be 2,000 or more men per day.

For the above reasons I do not think it can be said that the learned judge was wrong to find that the letter of agreement of November 19 did not contain the full terms of the contract. I think he was right to find that the basis for the tender contained the main terms of the contract, and that the actual intention (and not merely the presumed intention) of the parties could be ascertained therefrom, confirmed, as the judge found, by implications from other factors that this was so. In *Pollock on Contracts* (13th Edn.) at p. 226 it is said:

“Further, a statement about the subject matter of an agreement made in the course of the preliminary negotiation by the party with whose knowledge it is or ought to be may amount to a condition if such appears to be the intention of the parties, though the agreement itself does not embody it as part of the description;”

The basis for the tender was the express understanding between the parties that the appellants would be required to supply throughout the whole term of the appellants' contract with the War Office a number of meals per day commensurate with the number of men employed by the appellants on the site. Any reference to a “specified number” of meals clearly meant, as the learned judge held, the number which might vary from day to day, which could be readily ascertained.

The learned judge, in case he was wrong in finding that the understanding between the parties was an express term, went on to consider whether it was otherwise an implied term. He referred to authorities which laid down the principles to be followed in such circumstances, and largely in the light of the factors on which he had held there was an express term, he held that at least an implied term must be inferred. I am not prepared to say his reasoning was at fault, although amongst the cases he cited I agree with counsel for the appellants that *Luxor (Eastbourne) Limited v. Cooper* (5), was hardly apposite. Counsel for the appellants has referred to *Oscar Chess Limited v. Williams* (6). There the question was whether there was a warranty by the seller of a car that it had first been registered in 1948, whereas in fact, it was a 1939 model. Counsel for the appellants drew attention to that part of the judgment of Denning, L.J. (as he then was) ([1957] 1 All E.R. at p. 328 G) which reads:

“It is sometimes supposed that the tribunal must look into the minds of the parties to see what they themselves intended. That is a mistake. Lord Moulton made in quite clear in *Heilbut, Symons & Co. v. Buckleton* (7) [1913] A.C. at p. 51) that ‘The intention of the parties can only be deduced from the totality of the evidence . . .’ The question whether a warranty was intended depends on the conduct of the parties, on their words and behaviour, rather than on their thoughts.”

Denning, L.J., said that the trial judge had asked himself whether the representation was “fundamental to the contract”, and finding it was, held it to be a

condition and not a warranty, Denning, L.J., said “By concentrating on whether it was fundamental, he seems to me to have missed the crucial point in the case which is whether it was a term of the contract at all”. Counsel for the appellants submits that this is what the learned judge did in the instant case, in saying that the respondent could not carry out his part of the contract if the meals were withdrawn, the respondent’s contract depending on the “very nature and continued existence” of the terms he alleged. It is to be observed, that these remarks of the learned judge had regard to the factors under the seven heads (*supra*), and it seems to me that the judge had very much in mind whether the alleged terms were, in fact, terms in the contract, and that he deduced that they were from the totality of the evidence showing the conduct, words and behaviour of the parties.

I now come to the question whether the judge was right to hold that the contract was not frustrated. In coming to that conclusion he held that there was no implied term as alleged in para. 2 (*b*) of the defence (*supra*), and that the contract did not become impossible of performance, because the appellants of their own motion had agreed to the demands of their labour to dispense with contractual meals, and that the doctrine of frustration did not therefore apply. The onus of proving frustration is on the party alleging it, and if that is proved the onus is upon the other party to prove that it was self-induced. The doctrine is codified in the Indian Contract Act, 1872, as applied to Kenya at the material time, the relevant part of the second paragraph of s. 56 of which reads:

“A contract to do an act which, after the contract is made, becomes impossible, . . . becomes void when the act becomes impossible . . .”

Although this purports to lay down a positive rule of law regardless of the parties’ intention, it would seem that the section has been interpreted by the courts of India in a practical and broad manner, to the extent of virtually introducing the English doctrine of frustration. That this is so, is discussed at some length in *Parshotam Das v. Batala Municipality* (7) ([1949] A.I.R. E.P. at p. 304). In *Pollock* it is said at p. 229: ‘It does not appear, however, that there has in practice been any material divergence from English doctrine.’ Counsel before us have not sought to differentiate the Indian and English law, as applicable anyway to the existing facts.

The principles to be followed have been laid down in a number of important cases. In *Turner v. Goldsmith* (8) Lindley, L.J., said ([1891] 1 Q.B. at p. 549):

“*Taylor v. Caldwell* (11) contains some observations which are very much in point. Blackburn, J., there says: ‘There seems no doubt that where there is a positive contract to do a thing not in itself unlawful, the contractor must perform it or pay damages for not doing it, although in consequence of unforeseen accidents the performance of his contract has become unexpectedly burdensome or even impossible . . . But this rule is only applicable when the contract is positive and absolute, and not subject to any condition either express or implied, and there are authorities which we think establish the principle that where from the nature of the contract it appears that the parties must from the beginning have known that it could not be fulfilled, unless when the time for the fulfilment of the contract arrived, some particular specified thing continued to exist, so that when entering into the contract they must have contemplated such continuing existence as the foundation of what was to be done, then, in the absence express or implied warranty that the thing shall exist, the contract is not to be construed as a positive contract, but as subject to an implied condition that the parties shall be excused in case before breach performance becomes impossible from the perishing of the thing

without default of the contractor'. The substance of that is that the contract will be treated as subject to an implied condition that it is to be in force only so long as a certain state of things continues, in those cases only where the parties must have contemplated the continuing of that state of things as the foundation of what was to be done."

Constantine Steamship Line, Ltd. v. Imperial Smelting Corporation Ltd. (9) was a charter party case. The facts are not material, but Viscount Simon considered at length the doctrine of frustration. He quoted at p. 160 a decision of the Judicial Committee in *Maritime National Fish Ltd. v. Ocean Trawlers Ltd.* (10), in which it was said, "The essence of 'frustration' is that it should not be due to the act or election of the party". Viscount Simon went on to say at p. 163:

"It is well to emphasize that when 'frustration' in the legal sense occurs, it does not merely provide one party with a defence in an action brought by the other. It kills the contract itself and discharges both parties automatically".

He then observed that the doctrine of frustration had been explained in a number of ways and said:

"The most satisfactory basis, I think, on which the doctrine can be put is that it depends on an implied term in the contract of the parties".

He went on to say:

"Discharge by supervening impossibility is not a common law rule of general application, like discharge by supervening illegality; whether the contract is terminated or not depends on its terms and the surrounding circumstances in each case. Moreover, it seems to me that the explanation of supervening impossibility is at once too broad and too narrow. Some kinds of impossibility may in some circumstances not discharge the contract at all. On the other hand, impossibility is too stiff a test in other cases – for example, if the coronation cases, such as *Krell v. Henry*, [1903] 2 K.B. 740, are to be regarded as rightly decided on their facts, the explanation of such contracts coming to an end is not to be classed as due to impossibility, for the seats let remained available and the actions in those cases were brought for the payment or return of money. Every case in this branch of the law can be stated as turning on the question whether from the express terms of the particular contract a further term should be implied which, when its conditions are fulfilled, puts an end to the contract".

Pollock (13th Edn. *supra*) considered the principle underlying the doctrine, in the light of the judicial decisions (including the *Constantine* case (9)) and says at p. 232:

"After the formation of a contract, certain sets of circumstances arise which, owing to the fault of neither party, render fulfilment of the contract by one or both of the parties impossible in any sense or mode contemplated by them.

... the question which the judge has to solve is this. Would any reasonable third party consider the effect of such circumstances as altering the obligation of one or both of the parties to such an extent as to make the contract no longer capable of being enforced? The 'reasonable third party' is the court itself."

At p. 236 it is said:

"it is admitted law that generally where there is a positive contract to do a thing not in itself unlawful, the contractor must perform it, or pay damages

for not doing it, although in consequence of unforeseen accidents the performance of his contract has become unexpectedly burdensome or even impossible.”

This general statement of the law has to be considered in the light of the rule in *Taylor v. Caldwell* (11) (supra). Of the latter it is said in Pollock at p. 244:

“The rule in *Taylor v. Caldwell* (11) is now extended to cases where, without the destruction of any material object, a state of things contemplated by the parties as essential for performance according to their true intent fails to exist when the time for performance arrives, and this whether it is expressly mentioned in the terms of the contract or not.”

Lord Reid in *Davis Contractors Ltd. v. Fareham Urban District Council* (12) ([1956] 2 All E.R. at p. 153) said:

“It appears to me that frustration depends, at least in most cases, not on adding any implied term but on the true construction of the terms which are in the contract, read in light of the nature of the contract and of the relevant surrounding circumstances when the contract was made. There is much authority for this view.”

He then cited with approval Viscount Simon’s statement in *British Movietonews, Ltd. v. London & District Cinemas, Ltd.* (13) ([1951] 2 All E.R. at p. 625):

“If, on the other hand, a consideration of the terms of the contract, in the light of the circumstances existing when it was made, shows that they never agreed to be bound in a fundamentally different situation which has now unexpectedly emerged, the contract ceases to bind at that point – not because the court in its discretion thinks it just and reasonable to qualify the terms of the contract, but because on its true construction it does not apply in that situation.”

Bearing these principles in mind, (whether on the basis of an implied term or otherwise), can it be said that the term in the instant contract was positive or absolute? It was not (in the terms of s. 56 of the Indian Contract Act) literally speaking “impossible”, for the respondent was willing and able to supply meals and the number of men working could be ascertained. Had the men been taken off the work, or had ceased to have been employed by the appellants, the position would have been different, and possibly the rule in *Stirling v. Maitland* (14) (supra) would have had to have been considered.

Although I recorded counsel for the appellants as saying that he did not “strenuously” seek to support the implied term in para. 2 (b) of the defence it seems to me that in fact he and Mr. Deverell have relied on it. Their submission is that if for any reason the men refused to eat the meals the whole purpose of the contract vanished, and the contract was frustrated. In the circumstances of this case it seems to me that whether or not the contract was frustrated depends on such an implied term and change of circumstances; the learned judge observed that the implied term and frustration were “closely observed that the implied term and frustration were “closely connected”. The judge was of the opinion that there could be no such implied term “because the conditions or circumstances upon which the labourer’s willingness is based may be very considerably influenced by the act of the defendant company”. With respect I think there is a little confusion there. There could I think be such an implied term, but qualified by the further implied term that the appellant would do nothing of its own motion to put an end to the state of circumstances on which the contract depended, i.e., that the men should all receive a meal per day (the rule in *Stirling v. Maitland* (14) (122 E.R. at p. 1047).

The learned judge recognised the fundamental nature of the contract when he said,

“The plaintiff could not carry out his contract if the compulsory daily meal was withdrawn by the defendant, that is to say, if the subject matter, on the continued existence of which plaintiff’s performance of the contract depended, was destroyed by the defendant.”

The taking of the meals was just as fundamental, however, whether the men refused to eat them through no fault of the appellants, as if the appellants of their own motion withdrew them; in the former event the doctrine of frustration could apply, in the latter it could not. There are many cases where the doctrine has been applied and many where it has not, and each case depends on its own facts. A case with some similar characteristics is *Parshotam Das v. Batala Municipality* (7) (supra). There, the Municipal Committee had leased to the plaintiff “stands” intended for the use of certain vehicles. The drivers, however, preferred to use private stands with the result that the plaintiff obtained no fees. In an agreed judgment it was said ([1949] A.I.R. E.P. at p. 305):

“The general rule applicable to cases of this kind was enunciated in *Bush v. Whitehaven Town and Harbour Trustees* (15), in the following words:

‘Where a contract is made with reference to certain anticipated circumstances, and when it becomes wholly inapplicable or impossible of application to any such circumstances, without any default on the part of plaintiff, it ceases to have any application. It cannot be applied to other circumstances which could not have been in the contemplation of the parties when the contract was made.’

Since in the present case the plaintiff obtained the lease and the committee granted the same to him on the assumption that the tonga-stands, to which the lease related, would be used by the tonga-drivers of the town, and the plaintiff would recover fees from them, but for reasons which both sides could not help neither the tonga-drivers used the stands nor the plaintiff was able to recover anything from them, the doctrine of frustration applied with full force.”

The quotation from the Bush case (15) was taken from the headnote. The judgment itself had quoted from the judgment of Brett, J., in *Jackson v. The Union Marine Insurance Co. Ltd.* (16) ((1873) L.R. 8 C.P. at p. 581). The Bush case (15) was considered by the House of Lords in *Davis Contractors Ltd.* (12) (supra), and although the decision was not said to have been wrong, it was criticised in certain respects and should only be read in the light of the development of the doctrine of frustration in later cases. I think, however, that the reasoning in the *Parshotam Das* case (7) is relevant to the instant case, and that in the latter, on the judge’s own view the contract became inapplicable on the change of circumstances (whereby the men refused to take the meals) which neither party had contemplated, and that there was a presumption that the parties intended, or an implied term, that the contract should thereupon be regarded as discharged.

A special feature of this case is that whereas an intervening event bringing about frustration automatically terminates the contract, neither party recognised that this had been the effect of the event. The respondent of course continued to rely on the appellants’ obligation to pay according to the number of men employed. It is clear from the correspondence that following their new terms of agreement with the men at the end of April, 1960, the appellants also regarded their contract with the respondent as still subsisting, the latter’s liability still being to provide such number of midday meals per day as the men might want,

whether none or two thousand (see in particular the appellants' advocate's letter of August 13, 1960). The appellants say they were relying on their interpretation of the contract that it was liable only for meals served and not for the number of men on the site and, if that interpretation was correct, it did not have to rely on frustration and termination of the contract. Frustration was not specifically pleaded in their written statement of defence, although the learned judge thought it might be implied therein and would otherwise allow an amendment to include it. There has been no complaint by the respondent that, having accepted his construction of the contract, the judge was wrong to consider frustration, and I leave the matter there.

The next question is whether the appellants were at fault in bringing about the state of affairs which resulted in virtually no further meals being required. The learned judge held they were, and that the doctrine of frustration did not therefore apply. Whilst recognising the pressure to which the appellants were put by their labour, he suggested that, for instance, had the appellants continued to insist on the contractual meals, the men might have given way, even though in the meanwhile the strike would have been prolonged; or that the strikers might have been dismissed and new labour recruited. With respect, I think that on the evidence both of these procedures may have been impracticable. Counsel for the respondent, pointed out, however, that the appellants had at the outset of their contract with the men recognised the probability that it would have to increase their wages during the course of the contract. Colonel Hasildon, a director of the appellants, said in evidence that the appellants expected during the course of the contract to have to alter the terms of service of labour by increasing wages, and that such would be "in accordance with company policy". It would seem that such an increase might well have been accomplished by merely continuing the meals without any deduction from the men's wages. Such a proposition was not put to the men, the reason given being that even though it might have satisfied their immediate complaint they would shortly afterwards have again demanded money, this time in lieu of the free meals. This was no more than an expression of opinion, and there is no evidence to support what on the face of it would appear to be an unjustifiable view. As I see it, the appellants were under a duty to the respondent to attempt such reasonable solution of the matter as would retain to the respondent the benefit of his contract with the appellants, and this clearly was the view of the learned judge, and I think of Mr. Deverell. It may be that the appellants had little alternative but to enter into new terms of agreement with their labour, but I can see no reason why in doing so it should not still have provided them with a daily meal. The appellants' confessed policy was to do so for the maintenance of their health. Clearly the respondent was originally led to understand that the meal would be a term of contract between the appellants and the men. Whether, however, the meal was to be supplied by the appellants at a charge or free was no concern of the respondent. So long as the men were there to be fed, his agreement with the appellants was that he should supply them with the meal. The appellants, however, sought to absolve themselves from their obligation to require further meals an act they need not have done even though some hardship might result. The respondent was ready and willing to supply them; the men were there to eat them (and surely one can say that *prima facie* they would have done so had they been free. Their only objection before had been the deduction of the cost from the wages), and the appellants were under an obligation to the respondent to pay for them. I cannot see that the change in terms of service with the men was a change which resulted from frustration but rather it caused the frustration. The learned judge appears to have thought that the onus lay on the appellants to prove that frustration had not arisen

through their fault. This, as I have said earlier, is not so. It appears clear, however, from the judgment that the judge would have come to the same conclusions as he did even had he not misdirected himself as to this. In the result I think that the learned judge was right to find that the appellants were in breach of their agreement with the respondent.

The seventh ground of appeal is that the learned judge misdirected himself in holding that there was evidence that the plaintiff had suffered any damage. The judge held that “damages must be assessed in relation to his loss of net profit on the provision of a daily meal at eighty cents per meal based on the actual daily strength of the labour force” over the period April 8, 1960, to February 28, 1962, when, presumably, the appellants completed their contract with the War Office. It was agreed by counsel at the trial that the assessment of the actual loss would be left in abeyance. Counsel for the appellants did not strongly argue this ground of appeal, and I can see nothing wrong in what was decreed.

In the eleventh ground of appeal objection was taken to the court’s order as to costs and interest. I do not think this was mentioned during the hearing of the appeal, and anyway I can see no reason to interfere with the order.

I would dismiss the appeal with costs and remit the case to the lower court for assessment of damages on the basis decreed. I would certify for two counsel.

Sir Samuel Quashie-Idun P: I agree with the judgment of my brother Crawshaw and I will only add a few observations of my own without attempting to cover the whole facts and grounds of appeal which, I think, my learned brother has so ably done in his judgment. In my judgment the principal questions in this appeal are:

- (1) Was it intended by the parties that their contract should be for a period which was that estimated to complete the appellants’ contract with the War Office?
- (2) Was it intended by the parties that the respondent should supply midday meals to the appellants’ entire African labour force which was in the average of between 2,000 and 2,500 meals per day?
- (3) Was it understood by the parties that the midday meals to the appellants’ African force were to be compulsory in the sense that every African labourer had to take it?
- (4) Was the appellants’ contract with the respondent frustrated?

The observations I wish to make concern the third and fourth questions above and in doing so, I do not intend to indicate any disagreement with the manner in which my brother Crawshaw has dealt with them, and also with the other questions raised in the appeal.

The nature of the agreement taken together can leave no doubt that it was intended by the appellants that for the reasons given by them, their entire African labourers should be provided with midday meals, the costs of which would be deducted from their wages, and which it was compulsory that the labourers should accept.

As far as the respondent was concerned, it was reasonable for him to believe that the appellants would see to it that the meals were accepted by these labourers and it seems to me that this amounts to a representation made by the appellants and which formed part of the contracts between the parties. Thus in the case of *Heilbut Symons and Co. v. Buckleton* (17), Viscount Haldane, L.J., stated as follows:

“... words which on the face of them appear to be simple representations of fact may, if the context so requires, import a contract of warranty. . . .

an affirmation can only be a warranty provided it appears on evidence to have been so intended.”

In 8 Halsbury’s Laws (3rd Edn.) at p. 195, the following passage appears:

“A representation made in the course of negotiations for a contract may amount to a condition or warranty. Whether it does so or not, depends upon whether it was intended by the parties to form part of the contract.”

In the present case, the respondent was not a party to the contract between the appellants and their African labourers; and it was no concern of his as to how the appellants would see to it that their labourers accepted the midday meals which the respondent had contracted to supply. A refusal by the labourers to accept the meals, cannot be a justification for the breach of the contract between the appellants and the respondent as long as the respondent was not responsible for the breach, unless the breach was occasioned by an act recognisable in law as rendering the contract impossible of performance.

In respect of the defence of frustration and the submissions which have been made to this court by counsel for the parties, I would say that in law that defence is not available to the appellants having regard to the evidence and the circumstances of the case. I think that even if the defence had been pursued more vigorously as was done in this court, the learned trial judge would still have come to the decision he came to. In 8 Halsbury’s Laws (3rd Edn.) p. 178 the learned authors states as follows:

“... the rule is that, if a party has made an absolute promise by which he warranted the possibility of performance, he is not discharged from his promise by impossibility. In general, however, if an event occurs which was outside the contemplation of the parties and which strikes at the basis of the contract, so as to frustrate the practical purpose of the contract the further performance of the contract is excused.”

In the present case, I have held the view that the appellant must be held to have represented to the respondent that they would see to it that their African labourers accepted the meals provided by the respondent under the contract.

It is also my view that the fact that the labourers refused to accept the meals cannot be regarded as an event which was outside the contemplation of the parties, for, I cannot conceive of any employer in these modern times not being able to take into consideration the possibility of a strike by his employees such as occurred in the present case when the appellant’s labourers refused to accept the midday meals provided by the respondent on the ground, not that they were not good, but that they objected to the whole principle of compulsory meals which involved the deduction of their costs from their wages.

In the case of *Redmond v. Dainton* (18), ([1920] 2 K.B. at p. 258), Lord Darling quoting a dictum in an earlier authority of *Paradine v. Jane* (19), stated in his judgment as follows:

“... ‘when the party by his own contract creates a duty or charge upon himself, he is bound to make it good, if he may, notwithstanding any accident or inevitable necessity, because, he might have provided against it by his contract’, so that it is no excuse if that which happens might have been provided against by the contract.”

In the case of *Sargent & Sons v. Paterson & Co.* (20), it was held that mere impossibility of performance did not discharge a party where performance was not naturally impossible unless such a state of affairs had arisen as displaced the fundamental basis of the contract. It was also held in that case that in the absence of any strike, war or force majeure clause in the contract, the party who

had contracted to buy goods was entitled to damages for failure on the part of the sellers to deliver the goods.

The defence of frustration is defeated by proving that frustration or impossibility of performance of the contract was brought about by the party who relies on that defence. In law the onus of proving fault lies on the party alleging such fault. In the present case, I agree with the view expressed by my brother Crawshaw, that the learned trial judge misdirected himself when he held in effect that that onus was on the appellants. But as has been pointed out by Crawshaw, the trial judge could not have come to a different conclusion from the one he came to on this issue and on the evidence, even if he had properly directed himself.

There was sufficient evidence before the trial court which would entitled it to say that the frustration of the contract (if this was proved) was due to the fault of the appellants. See *Maritime National Fish Ltd. v. Ocean Trawlers Ltd.* (10), already referred to in the judgment of Crawshaw).

It was contended on behalf of the appellants in the present case that if they had offered the midday meals free of charge to their African labourers they would probably have accepted them at the outset and subsequently reject them and go back on their former demand insisting on an increase in wages and the abolition of the compulsory meals for which deductions were made from their wages. As has been submitted on behalf of counsel for the respondent, this offer was not made and it is difficult to say now whether or not it would have been accepted. But I still need a great amount of argument to convince me that African labourers would refuse to accept free meals from their employers when the wages paid to them are reasonable and when no complaints could be made against such wages.

There is no doubt that the provision of free midday meals would have necessitated extra expenditure on the part of the appellants and perhaps rendered the contract onerous; but, this would have been no concern of the respondents with whom the appellants had entered into the contract in the form as it was. I would refer to the case of *Hangkam Kwintong Woo v. Liu Lan Fong* (21). The appellant left Hong Kong during the Japanese occupation of that city and went to live in Free China. He gave a power of attorney to a person in Hong Kong authorising him to sell his real and personal property as he thought fit. In 1943 the Attorney entered into an agreement to sell to the respondent's husband certain real property owned by the appellant. The price of the property was duly paid and the documents were executed, but, the sale could not be completed in the absence of the requisite registration. The purchaser died in 1946 and the respondent who was the deceased' widow and executrix brought an action against the appellant for a specific performance of the agreement. The appellant pleaded that at all material times, he and his attorney were divided by the line of war and therefore the power of attorney was cancelled or abrogated and that he was not bound by the documents purported to have been executed on his behalf by his attorney. He also pleaded frustration of the agreement by reason of the fact that an ordinance which had been passed in Hong Kong had been placed on the appellant a burden not contemplated by him and which rendered him liable to a larger sum to the mortgagees of the property, beyond the amounts he had already paid in full discharge of the mortgage debts.

In the judgment delivered by Privy Council, Lord Simonds stated as follows:

"It is beyond question that the passing of the Ordinance placed on the appellant a burden not contemplated by him or by the purchaser at the date of the agreement . . . But the question is whether this change of fortune is to be regarded as so fundamental as to strike at the root of the agreement and render its performance in the manner contemplated by the parties impossible. In their Lordships' opinion, it clearly is not. The purchaser has long

since fulfilled his part of the agreement: the appellant as vendor can fulfil his part by the execution of a single document. It is therefore not a case where performance has become impossible.”

As I have said I agree that the appeal should be dismissed. There will be an order in the terms proposed by Crawshaw, J.A.

Crabbe JA: I also agree that this appeal fails, and I wish to make only some few observations on the two main submissions argued by counsel for the appellants.

As Crawshaw J.A. has said, counsel for the appellants constantly drew the attention of the court to the case of *Stirling v. Maitland* (14) and argued that the plaintiff could only succeed in his claim if he could bring his case within the principle established by that case. This principle was stated by Cockburn, C.J. in his judgment as follows (5 B. & S., at p. 852):

“I look on the law to be that, if a party enters into an arrangement which can only take effect by the continuance of a certain existing state of circumstances, there is an implied engagement on his part that he shall do nothing of his own motion to put an end to that state of circumstances, under which alone the arrangement can be operative. I agree that if the Company had come to an end by some independent circumstance, not created by the defendants themselves, it might very well be that the covenant would not have the effect contended for; but if it is put an end to by their own voluntary act, that is a breach of covenant for which the plaintiff may sue.”

If I may use the words of Lord Cairns, L.C. in *Rhodes v. Forwood* (1) ante,

“The simple point here appears to me to be, as it is admitted that there is no express contract which has been violated, can your Lordships say that there is any implied contract which has been violated?”

It was contended by counsel for the appellants, if I understood his argument, that the case of the plaintiff depended upon the continuance of a state of circumstances that it should be possible for him to supply a compulsory midday meal for the defendants’ entire labour force for the duration of the defendants’ contract with the War Department; that is, a period of two and half years. He submitted, therefore, that there should be an implied promise on the part of the defendants that they would do nothing to bring an end to the existing circumstances so as to prevent the plaintiff from obtaining the benefits under the contract. Counsel further submitted that if *Stirling v. Maitland* (14) applied then the plaintiff could not succeed, unless he could prove wilful default on the part of the defendants.

It is necessary therefore:

“to examine the contract and the circumstances in which it was made, not of course to vary, but only to explain it, in order to see whether or not from the nature of it the parties must have made their bargain on the footing that a particular thing or state of things would continue to exist. And if they must have done so, then a term to that effect will be implied, though it be not expressed in the contract”:

per Lord Loreburn in *Tamplin Steamship Co. Ltd. v. Anglo Mexican Petroleum Products Co. Ltd.*, (22) ([1916] 2 A.C. at p. 403).

After examining the contract the learned trial judge found as a fact that the agreement between the parties was that so far as catering for the African employees of the defendants was concerned the plaintiff was to supply a daily midday meal

for the entire labour force, as it existed from day to day, for the period then to run of the defendants' contract with the War Department. I think the evidence on the whole supports this finding.

A further examination of the circumstances shows that the reason for making a compulsory midday meal as part of the terms of service of the defendants' African employees was that most of them appeared undernourished, and it was necessary to give them specially prepared meals in order to increase their productive output. It seems to me therefore that the supply of a good meal for the labour force was the main foundation of the contract, and that the element of compulsion was merely an inducement.

The evidence further shows that it was fully recognised by the defendants that in accordance with their policy they would, at a later stage, have to alter the terms of service of the African employees by increasing their wages, but without departing from the free midday meals. This alteration or revision of service conditions, as experience of industrial relations shows, could cause such dissatisfaction among the employees as would result in stoppage of work entirely.

It was contended by the plaintiff that the defendants could have maintained the existing state of circumstances by replacing the whole or part of their labour force. But this, it was said, was impossible in all the circumstances as it would have created security risks.

Could it therefore be said in all the circumstances of this case that the parties entered into any guarantee that the state of things would continue to exist? I have no reason to think that they did. It is hard to conceive that any employer of labour in this modern world, where strikes have become an effective weapon in the hands of labour, can confidently guarantee to keep his labour force at a certain level for a definite period of time. It was reasonable to anticipate that the contract could be brought to an abrupt end by the labourers calling a strike, as it in fact happened. I do not also think that the defendants could guarantee that they could compel their employees to eat, or that they would pay for, a compulsory meal, even if the quality or quantity of the food did not satisfy the employees. Moreover, I think it would be oppressive in view of the political situation at the time to imply a term that the defendants should maintain the state of affairs as they existed at the making of the contract.

Any of these factors I have mentioned could have brought the contract to an abrupt end, and there is nothing in the agreement that it should absolutely continue for two and a half years. In *Rhodes v. Forwood* (1) Lord Chelmsford said ((1876), 1 App. Cas. at p. 268):

"But what is there in the agreement to prevent its coming positively to a premature end, either by the agents giving up business or the owner giving up the colliery? The mere agreement for seven years, or the provisions for the determination of it on either side, will not be sufficient, and if it had been intended that the relation of the parties should absolutely continue for seven years, it ought to have been provided for, and not being provided for, it cannot in my opinion be taken to have been intended."

It seems to me that a *Stirling v. Maitland* (14) term cannot be implied in the particular circumstances of this case. Even if I were to come to the conclusion that such term ought to be implied, I would unhesitatingly hold that the withdrawal of the compulsory meal by the defendants was not "an independent circumstance", and that the contract was brought to an end by the voluntary act of the defendants.

The second string to the defendants' bow was that in consequence of the labourers' refusal to take the meals, their contract with the plaintiff was frustrated.

For the appellants counsel submitted that if the learned trial judge's finding that there was a term to pay for a meal per day for every man on the site was right then the new fact that subsequently arose would make that term useless. He contended that the contract was frustrated if the circumstances made performance impossible, or the obligation different from that under the original contract.

The learned trial judge held that the defence of frustration would not avail the defendants, and I think he was right.

It was pleaded in para 2 (b) of the amended defence as follows:

"The said agreement in so far as it relates to the defendant's catering requirements for its African Employees was subject to a term necessarily implied by law that the employees would be and remain willing to accept a midday meal as part of their emoluments."

This averment in the defendants' pleadings appears to be based on the principle thus explained by Lord Loreburn in *Tamplin Steamship Co. Ltd. v. Anglo-Mexican Petroleum Products Co. Ltd.*, (22), ([1916] 2 A.C. at pp. 403, 404):

"... when our courts have held innocent contracting parties absolved from further performance of their promises, it has been upon the ground that there was an implied term in the contract which entitled them to be absolved. Sometimes it is put that performance has become impossible and that the party concerned did not promise to perform an impossibility. Sometimes it is put that the parties contemplated a certain state of things which fell out otherwise. In most of the cases it is said that there was an implied condition in the contract which operated to release the parties from performing it, and in all of them I think that was at bottom the principle upon which the court proceeded. It is in my opinion the true principle, for no court has an absolving power, but it can infer from the nature of the contract and the surrounding circumstances that a condition which is not expressed was a foundation on which the parties contracted.

When this question arises in regard to commercial contracts, as happened in *Dahl v. Nelson, Donkin & Co.* (1881), 6 App. Cas. 38, *Geipel v. Smith*, L.R. 7 Q.B. 404, and *Jackson v. Union Marine Insurance Co.*, L.R. 10 C.P. 125, the principle is the same, and the language used as to 'frustration of the adventure' merely adapts it to the class of cases in hand. In all these three cases it was held, to use the language of Lord Blackburn, 'that a delay in carrying out a charterparty, caused by something for which neither party was responsible, if so great and long as to make it unreasonable to require the parties to go on with the adventure, entitled either of them, at least while the contract was executory, to consider it at an end'. That seems to me another way of saying that from the nature of the contract it cannot be supposed the parties, as reasonable men intended it to be binding on them under such altered conditions. Were the altered conditions such that, had they thought of them, they would have taken their chance of them, or such that as sensible men they would have said 'if that happens, of course, it is all over between us'?"

In that same case Lord Atkinson also observed as follows ([1916] 2 A.C. at p. 422):

"... there is here involved such a substantial invasion of that freedom of both parties to exercise the rights and discharge the obligations secured to and imposed upon them by the charterparty, the continued existence of which must, I think, have necessarily been in their contemplation as to the foundation of their contract when they entered into it, that, in the events which have happened, each of them is now entitled to treat it as at an end."

This passage from the judgment of Lord Atkinson is in a sense applicable to the present case, where the continued provision of a compulsory meal has been rendered impossible by the refusal of the employees to eat, and the freedom of the parties has been substantially invaded by that event.

The vital question in this case is: Does the doctrine of frustration apply in this case?

It is unnecessary in this judgment to examine the juridical basis of the doctrine, but it seems clear to me that the theory of an implied term does not now have any or much judicial support. Thus in *Denny, Mott & Dickson Ltd. v. Fraser & Co. Ltd.* (23) ([1944] A.C. at pp. 274-275) Lord Wright said:

“Where, as generally happens, and actually happened in the present case, one party claims that there has been frustration, and the other party contests it, the court decides the issue and decides it ex post facto on the actual circumstances of the case. The data for decision are, on the one, hand, the terms and construction of the contract, read in the light of the then existing circumstances, and on the other hand the events which have occurred. It is the court which has to decide what is the true position between the parties.”

Lord Wright continues at p. 276:

“The event is something which happens in the world of fact, and has to be found as a fact by the judge. Its effect on the contract depends on the meaning of the contract, which is matter of law. Whether there is frustration or not in any case depends on the view taken of the event and of its relation to the express contract by ‘informed and experienced minds.’”

In *Davis Contractors v. Fareham Urban District Council* (12) ([1956] 3 W.L.R. at pp. 61-63) Lord Radcliffe, having rejected the implied term theory, explained the circumstances in which the doctrine operates in these words:

“Lord Loreburn ascribes the dissolution to an implied term of the contract that was actually made. This approach is in line with the tendency of English courts to refer all the consequences of a contract to the will of those who made it. But there is something of a logical difficulty in seeing how the parties could even impliedly have provided for something which, ex hypothesi, they neither expected nor foresaw; and the ascription of frustration to an implied term of the contract has been criticised as obscuring the true action of the court which consists in applying an objective rule of the law of contract to the contractual obligations that the parties have imposed on themselves. So long as each theory produces the same result as the other, as normally it does, it matters little which theory is avowed (see *British Movietonews Ltd. v. London & District Cinemas Ltd.* (13) ([1951] 2 All E.R. at p. 624 per Viscount Simon)). But it may still be of some importance to recall that, if the matter is to be approached by way of implied term, the solution of any particular case is not to be found by inquiring what the parties themselves would have agreed on had they been, as they were not, forewarned. It is not merely that no one can answer that hypothetical question; it is also that the decision must be given ‘irrespective of the individuals concerned, their temperaments and failings, their interests and circumstances’ (*Hirji Mulji v. Cheong Yue S. S. Co.* ([1926] A.C. at p. 510)). The legal effect of frustration ‘does not depend on their intention or their opinions, or even knowledge, as to the event, when the event occurs, the:

‘meaning of the contract must be taken to be, not what the parties did intend (for they had neither thought nor intention regarding it), but that which the parties, as fair and reasonable men, would presumably

have agreed upon if, having such possibility in their several rights and liabilities in the event of its occurrence'

(*Dahl v. Nelson, Donkin & Co.*, ((1881), 6 App. Cas. at p. 59, per Lord Watson)).

By this time it might seem that the parties themselves have become so far disembodied spirits that their actual persons should be allowed to rest in peace. In their place there rises the figure of the fair and reasonable man. And the spokesman of the fair and reasonable man, who represents after all no more than the anthropomorphic conception of justice, is, and must be, the court itself. So, perhaps, it would be simpler to say at the outset that frustration occurs whenever the law recognises that, without default of either party, a contractual obligation has become incapable of being performed because the circumstances in which performance is called for would render it a thing radically different from that which was undertaken by the contract. *Non haec in foedera veni*. It was not this that I promised to do. There is, however, no uncertainty as to the materials on which the court must proceed.

'The data for decision are, on the one hand, the terms and construction of the contract, read in the light of the surrounding circumstances, and, on the other hand, the events which have occurred.'

(*Denny, Mott & Dickson Ltd. v. Fraser & Co. Ltd.* (23) ([1944] 1 All E.R. at p. 683, per Lord Wright).

In the nature of things there is often no room for any elaborate inquiry. The court must act on a general impression for what its rule requires. It is for that reason that special importance is necessarily attached to the occurrence of any unexpected event that, as it were, changes the face of things. But, even so, it is not hardship or inconvenience or material loss itself which calls the principle of frustration into play. There must be as well such a change in the significance of the obligation that the thing undertaken would, if performed, be a different thing from that contracted for."

In the recent case of *Ocean Tramp Tankers Corporation v. V/O Sovfracht* (24) ([1964] 1 All E.R. at pp. 165-166) Lord Denning, M.R. also made a very exhaustive and illuminating examination of the doctrine of frustration. He said:

"Would the contract be frustrated? This means that, once again, we have had to consider the authorities on this vexed topic of frustration. But I think that the position is now reasonably clear. It is simply this: If it should happen, in the course of carrying out a contract, that a fundamentally different situation arises for which the parties made no provision – so much so that it would not be just in the new situation to hold them bound to its terms – then the contract is at an end.

It was originally said that the doctrine of frustration was based on an implied term. In short, that the parties, if they had foreseen the new situation, would have said to one another: 'If that happens, of course, it is all over between us'. But the theory of an implied term has now been discarded by everyone, or nearly everyone, for the simple reason that it does not represent the truth. The parties would not have said: 'It is all over between us'. They would have differed about what was to happen. Each would have sought to insert reservations or qualifications of one kind or another. Take this very case. The parties realised that the canal might become impassable. They tried to agree on a clause to provide for the contingency. But they failed to agree. So there is no room for an implied term.

It has frequently been said that the doctrine of frustration only applies when the new situation is 'unforeseen' or 'unexpected' or 'uncontemplated',

as if that were an essential feature. But it is not so. It is not so much that it is 'unexpected', but rather that the parties have made no provision for it in their contract. The point about it, however, is this: If the parties did not foresee anything of the kind happening, you can readily infer that they have made no provision for it. Whereas, if they did foresee it, you would expect them to make provision for it. But cases have occurred where the parties have foreseen the danger ahead, and yet made no provision for it in the contract. Such was the case in the Spanish Civil War when a ship was let on charter to the Republican Government. The purpose was to evacuate refugees. The parties foresaw that she might be seized by the Nationalists. But they made no provision for it in their contract. Yet, when she was seized, the contract was frustrated: see *Tatem Ltd. v. Gamboa*, [1938] 3 All E.R. 135. So, here, the parties foresaw that the canal might become impassable. It was the very thing that they feared. But they made no provision for it. So the doctrine may still apply, if it be a proper case for it.

We are thus left with the simple test that a situation must arise which renders performance of the contract 'a thing radically different from that which was undertaken by the contract': see *Davis Contractors, Ltd. v. Fareham U.D.C.* (12) ([1956] 2 All E.R. at p. 160); per Lord Radcliffe. To see if the doctrine applies, you have first to construe the contract and see whether the parties have themselves provided for the situation that has arisen. If they have provided for it, the contract must govern. There is no frustration. If they have not provided for it, then you have to compare the new situation with the old situation for which they did provide. Then you must see how different it is. The fact that it has become more onerous or more expensive for one party than he thought is not sufficient to bring about a frustration. It must be more than merely more onerous or more expensive. It must be positively unjust to hold the parties bound. It is often difficult to draw the line. But it must be done, and it is for the courts to do it as a matter of law: see *Tsakiroglou & Co. Ltd. v. Noble & Thorl G.m.b.H.* ([1961] 2 All E.R. at pp. 185, 187); per Viscount Simonds and per Lord Reid."

It follows, therefore, in my view, that an application of the doctrine depends upon a proper construction of the contract, and the question whether the contract is discharged does not depend upon the presumed intention of the parties at all, but on an unexpected occurrence which in the opinion of the judge has frustrated the main purpose of the common venture. The real question in this case, of course, is whether the defendants can reasonably be said to have undertaken the business risk of pecuniary loss resulting from the sudden turn of events.

In stating the test which should be applied in determining whether the occurrence of an event discharges one of the parties from further performance of his obligation under a contract Diplock, L.J. said in *Hong Kong Fir Shipping Co. Ltd. v. Kawasaki Kisen Kaisha Ltd.* (25) ([1962] 1 All E.R. at p. 485):

"The test whether an event has this effect or not has been stated in a number of metaphors all of which I think amount to the same thing: does the occurrence of the event deprive the party who has further undertakings still to perform of substantially the whole benefit which it was the intention of the parties as expressed in the contract that he should obtain as the consideration for performing those undertakings? This test is applicable whether or not the event occurs as a result of the default of one of the parties to the contract, but the consequences of the event are different in the two cases. Where the event occurs as a result of the default of one party, the party in default cannot rely on it as relieving himself of his performance of any further undertakings on his part and the innocent party, although

entitled to, need not treat the event as relieving him of the performance of his own undertakings. This is only a specific application of the fundamental legal and moral rule that a man should not be allowed to take advantage of his own wrong. Where the event occurs as a result of the default of neither party, each is relieved of the further performance of his own undertakings, and their rights in respect of undertakings previously performed are now regulated by the Law Reform (Frustrated Contracts) Act, 1943.”

The undertaking by the appellants in this case, as the learned judge found, was to pay for man per meal for the whole labour force on the site. Applying therefore Diplock, L.J.’s test the vital question is: Did the refusal of the workers to have compulsory midday meals deprive the appellants of the benefit of the contract? Counsel for the appellant submitted that there was such deprivation and I agree entirely with him.

But the learned trial judge made the following finding:

“... the subject matter of the plaintiff’s contract was destroyed by the act of the defendant in agreeing to the demand of its labourers to dispense with the compulsory meal.”

The learned judge then said:

“It is for these reasons that I do not think it can be held in the circumstances of the case that the defendant can avail himself of the defence of frustration.”

Earlier in his judgment, however, the learned judge had given in the following passage his reasons for holding that the defendants could not successfully rely on frustration:

“... the defendant company chose to meet the strikers’ demand by doing away with the compulsory meal and the payment of money in lieu thereof. In other words, it was due to the defendant’s act, no doubt under pressure from the labourers, that the subject matter of its contract with the plaintiff was destroyed, and its action was dictated, I think there can be no doubt, by expediency. The company was anxious to settle the strike with a view to continuing its contract with the War Department, and not to have done so when it did would have been inconvenient to it and would possibly have caused it material loss. But as Lord Radcliffe in *Davis Contractors* pointed out, ‘It is not hardship or inconvenience or material loss itself which call the principle of frustration into play.’”

It is now well established that the doctrine of frustration cannot apply where the event which is alleged to have frustrated the contract arises from the “act or election of the party” who seeks to invoke it. “Reliance cannot be placed on a self-induced frustration”: per Lord Sumner in *Bank Line Ltd. v. Arthur Capel and Co.* (26) ([1919] A.C. at p. 425). But this does not mean that he must prove affirmatively that the event occurred without his fault. The onus of proving that the frustration was self-induced lies upon the party alleging it: see *Constantine Steamship Line, Ltd. v. Imperial Smelting Corporation Ltd.* (9).

The learned judge appears unfortunately to have placed the burden of proving that the frustration was not self-induced on the defendants. With respect, I also think that he erred. In the *Constantine* case (9) Lord Porter said ([1942] A.C. at p. 205):

“In truth, the words ‘without default on either side’ are not used for the purpose of establishing what has to be proved by either party. Rather they are necessarily inserted to limit the cases to which the doctrine of

frustration applies. If a party be in fault the doctrine is not to be invoked by him. If he is not in fault, it may be. But they have no bearing on the onus of proof. They qualify the doctrine; they do not impose on the party seeking to be excused the necessity of proving want of fault either in himself or in his opponent.”

I do not, however, think that this misdirection by the trial judge materially affects his main conclusion that the frustrating event was brought by the fault of the defendants.

None of the authorities on the subject which I have consulted defines or illustrates the meaning of “fault” or “default”. But it is clear that each means some “positive acts against the faith of the contract which amount to a repudiation and would justify recession”. There can be no doubt that the foundation of the contract was destroyed by the positive acts of the defendants, and on the facts as found by the learned trial judge I do not think it would be positively unjust to hold the defendants bound by the contract.

Further, it is true that the event which happened defeated the main object of the contract, but, in my judgment, that was the risk of the defendants who undertook to provide compulsory meals; and, to imply a term, as suggested by them, would be to commit the plaintiff to consequences which were dependent upon facts and circumstances which were the sole concern of the defendants.

For the reasons I have given I agree that the judgment of Edmonds, J. should be affirmed.

Appeal dismissed. Case remitted to Supreme Court for assessment of damages.

For the appellants

Kaplan & Stratton, Nairobi

S. A. Stamler (of the English Bar) and W.S. Deverell

For the respondent:

Robson, Harris & Co., Nairobi

Clive Salter, Q.C. and A.W. Robson

Farmer and another v Uganda Argus Limited
[1964] 1 EA 568 (HCU)

Division:	High Court of Uganda at Kampala
Date of judgment:	11 July 1964
Case Number:	317 and 349/1963
Before:	Sir Udo Udoma CJ
Sourced by:	LawAfrica

[1] *Libel – Privilege – Malice – Newspaper report – Allegation of improper conduct by public official – General public interest – Publication without malice – Qualified privilege.*

Editor's Summary

The two plaintiffs who were the Director of Public Prosecutions and the Attorney – General respectively of Uganda, sued the defendants as proprietors, printers and publishers of the Uganda Argus for damages for an alleged libel. The two actions were consolidated. The case of the plaintiffs was that the first plaintiff, acting independently and without any direction or interference, but in exercise of his powers under s. 82 of the Constitution of Uganda, issued instructions that a criminal case against one E.L., then before the Principal Court of Buganda, be discontinued. He served those instructions on the Deputy Registrar of Buganda courts and the Attorney General of the Kabaka's Government. Shortly thereafter the "Uganda Argus" under the heading "Government stops 'Common Man' Trial" published an article stating inter alia: "Uganda's Acting Director of Public Prosecutions, acting under the instructions of the Uganda Attorney-General has ordered the Kabaka's Principal Court to discontinue all criminal proceedings against Eriabu Lwebuga, leader of the "Common Man" pressure group within Kabaka Yekka." The first plaintiff claimed that

by the words used the defendants meant that he had failed to exercise the discretion which he and he alone was required to exercise under s. 82 of the Constitution of Uganda of deciding whether the trial should be discontinued and had dishonestly, and in default of his duties, acted upon the instructions of and in subservience to the Attorney – General of Uganda, that he unlawfully interfered with the course of justice and had thereby committed a criminal offence, that he had committed a contempt of court which was also a criminal offence and was unfit to hold his office. The second plaintiff's case was similar and both alleged that they had been seriously injured in character, credit and reputation and in the way of their respective offices, had been brought into public scandal, odium and contempt and suffered much pain and humiliation. The main defence was qualified privilege and that the publication was without malice, that the prosecution and the withdrawal thereof were matters of great public interest and that the plea of qualified privilege could only be destroyed by express malice of which there had been no evidence and of which the onus rested squarely on the plaintiffs. The plaintiffs contended that the onus of proof that withdrawal of the case was a matter of great public interest had not been discharged, nor had the defendants shown that they had an interest and duty to publish the article or that their readers had a corresponding interest or duty to receive it.

Held –

- (i) the article complained of was published not to inform the general public but because the reporter of the Uganda Argus was anxious to obtain a story for his newspaper;
- (iii) the court was satisfied that neither the reporter nor the defendants had any interest or duty to publish the article complained of; nor was there a corresponding interest or duty in the public to whom it was published to receive it;
- (ii) it was not sufficient that the maker of the statement honestly and reasonably believed that the person to whom it was made had such an interest or duty;
- (iv) the withdrawal of the case by the Director of Public Prosecutions was not of general public interest but was of interest to a small section of the people in Buganda; the plea of qualified privilege therefore failed;
- (v) the article was not only of its plain and ordinary meaning defamatory of the plaintiffs, but was also capable of bearing and was understood to bear the meaning ascribed to it by the plaintiffs.

Judgment for the plaintiffs. Damages of Shs. 40,000/- and Shs. 50,000/- awarded to the first and second plaintiffs respectively.

Cases referred to in judgment:

- (1) *Webb v. The Times Publishing Co. Ltd.*, [1960] 2 All E.R. 789.
- (2) *Smith v. Streatfield Publishing Co. Ltd.*, [1913] 3 K.B. 764; [1913] All E.R. Rep. 362.
- (3) *Langdon-Griffiths v. Smith and theors*, [1951] 1 K.B. 295.
- (4) *Chapman v. Ellesmere*, [1932] 2 K.B. 431, [1932] All E.R. Rep. 221.
- (5) *Harrison v. Bush* (1855), 5 E.B. 344.
- (6) *Adam v. Ward*, [1917] A.C. 309; [1917] All E.R. Rep. 157.

- (7) *Hedbitch v. MacIlwaine*, (1894), 2 Q.B. 54.
- (8) *De Buse v. McCartley*, [1942] 1 K.B. 156.
- (9) *Simpson and another v. Downs and another* (1867), 16 L.T. 391.
- (10) *Sturt v. Blagg* (1847), 10 Q.B. 906.
- (11) *Praed v. Graham* (1890), 24 Q.B.D. 53.
- (12) *Smith v. Harrison* (1856), 1 F. and F.565.

Judgment

Sir Udo Udoma CJ: These two consolidated suits, Nos. 317 and 349 of 1963, were separately filed in this court by George Wallace Farmer, the Director of Public Prosecutions of Uganda (hereinafter in this judgment to be referred to as the first plaintiff) and Godfrey Lukongwa Binaisa, the Attorney-General of Uganda (hereinafter in this judgment to be referred to as the second plaintiff) respectively against the Uganda Argus Limited, a limited liability Company, proprietors, printers and publishers of a daily newspaper styled Uganda Argus (hereinafter in this judgment to be referred to as the defendants) for damages for an alleged libel published in the issue of the said newspaper, the Uganda Argus of February 11, 1963. The two suits were by order of court and by the consent of both parties consolidated on May 27, 1964. They were therefore tried together in this court.

The complaint of the first plaintiff is set out and pleaded in the plaint filed herein, paras. 3, 4 and 5 whereof are as follows:

- “3. On page 1 of the issue of the said newspaper ‘Uganda Argus’ dated 11th February 1963, under the heading ‘Government Stops Common Man Trial’ the defendant falsely and maliciously printed and published and caused to be printed and published of and concerning the plaintiff and concerning him in the way of his said office of Acting Director of Public Prosecutions as aforesaid, the words following; that is to say:

Government
Stops ‘Common
Man’ Trial

‘Uganda’s Acting Director of Public Prosecutions, acting under the instructions of the Uganda Attorney-General has ordered the Kabaka’s Principal Court to discontinue all criminal proceedings against Eriabu Lwebuga, leader of the “Common Man” pressure group within Kabaka Yekka.

Asked about the order, Mr. Fred Mpanga, Legal Officer to the Kabaka’s Government said it was dated February 9 and “purported” to have been made under s. 82 sub-s. 2 (c) of the Uganda Constitution. It was handed to him by the Chief of the C.I.D., Mr. George Anderson.

Sources close to Mengo revealed yesterday that as a result of the order, the Buganda Lukiko had been summoned to hold an “emergency” session in Mengo today to discuss the possibility of amending the Buganda Constitution in order to give the Kingdom more powers to handle criminal proceedings.

Lwebuga has been charged under Buganda customary law with issuing seditious publications aimed at inciting violence among the Kabaka’s subjects, distracting their loyalty and overthrowing the Buganda Government headed by Mr. Michael Kintu.

Subsection 2 (c) of s. 82 of the Uganda Constitution gives the Director of Public Prosecutions powers “to discontinue at any stage before judgment is delivered any such criminal proceedings instituted or under taken by himself or any other person or authority.”

Mr. Mpanga said that he had reason to believe that similar measures might be taken by the Central Government in relation to the case of Joseph Kazairwe, leader of the Mubende-Bunyoro Committee, who is alleged

to have incited people to refuse to pay taxes and market dues. The case is in the Buganda principal court.

He said that in the case of Lwebuga, the principal court was expected on reception of the order of the Director of Public Prosecutions to discontinue the proceedings as directed.

“This order constitutes not only an unprecedented interference with the course of justice in a free country, but is also a deplorable and deliberate contempt of court on the part of the Director of Public Prosecutions Mr. Mpanga said.

If the Director of Public Prosecutions could order the discontinuance of criminal proceedings “just by sending to any court a piece of writing to that effect”, he could also by the same process order “trial and conviction”.

“This would be the end of individual freedom”, Mr. Mpanga said, “and it will be resisted by all means available to the Kabaka’s Government”.

It was imperative in the interests of law and order and good government both in Buganda and Uganda, that as little interference as possible should be made by the Central Government in the affairs of Buganda.’

4. By the said words the defendant meant and was understood to mean:
 - (a) that the plaintiff had failed to himself exercise the discretion which he and he alone was required to exercise by s. 82 of the Constitution of Uganda of deciding whether the trial against Eriabu Lwebuga should be discontinued and had dishonestly and in default of his duties therein as defined by s. 82 of the said Constitution acted upon the instructions of and in subservience to the Attorney-General in and for Uganda;
 - (b) that the plaintiff had committed an unprecedented and unlawful interference with the course of justice, and had thereby committed a Criminal offence punishable by the Uganda Penal Code (Cap. 22, Laws of Uganda);
 - (c) that the plaintiff had committed a deplorable and deliberate contempt of Court which was also a criminal offence punishable under the said Code and under the inherent jurisdiction of the court;
 - (d) that the plaintiff had deliberately and dishonestly acted in a manner inconsistent with the interests of law and order and good Government in Buganda and Uganda, and was unfit to hold his said office of Acting Director of Public Prosecutions.
5. The plaintiff has in consequence been seriously injured in his character, credit and reputation and in the way of his said offices, and has been brought into public scandal, odium and contempt and suffered much pain and humiliation.”

The averments pleaded in para. 3 of the second plaintiff’s plaint are in identical terms with the contents of para. 3 of the first plaintiff’s plaint set out above, but the averments in paras. 4 and 5 are differently stated and are as hereunder set forth:

- “4. By the said words the defendant meant and was understood to mean:
 - (a) that the plaintiff had acted in an unconstitutional and dishonest manner and had contravened s. 82 of the Constitution of Uganda and was in consequence wanting in honesty and integrity as the Attorney-General of Uganda;

- (b) that the plaintiff had instructed the Director of Public Prosecutions to interfere with the course of justice which is a criminal offence under the Uganda Penal Code, in a manner which was unprecedented in a free country;
 - (c) that the plaintiff had instructed the Director of Public Prosecutions to commit a deplorable and deliberate contempt of court which is a criminal offence under the Uganda Penal Code;
 - (d) that by his instructions the plaintiff had deliberately and dishonestly acted in a manner inconsistent with the interests of law and order and good government in Buganda and Uganda, and was unfit to hold his said office of Attorney-General of Uganda.
5. By reason of the premises the plaintiff has been greatly prejudiced and injured in his credit and reputation and in his office as the Attorney-General of Uganda and leader of the Uganda Bar, and has been brought into public scandal, contempt and ridicule and suffered much pain and humiliation.”

In paras. 2, 3 and 4 of their written statement of defence, the defendants pleaded in answer to the averments contained in paras. 3, 4 and 5 of the complaints of the first and second plaintiffs in the following terms:

- “2. Defendants admit that the words complained of in para. 3 of the complaint were published by them on 11th February 1963 in the Uganda Argus newspaper. The publication was without malice and the occasion of publication was an occasion of qualified privilege.

Particulars

- (a) The prosecution of Eriabu Lwobuga was instituted by the legal authorities in Buganda and one Fred Mpanga was at all material times legal officer to the Kabaka’s Government and was the person upon whom the order withdrawing the prosecution was served on behalf of the plaintiff.
 - (b) The said prosecution and withdrawal thereof were matters of great public interest.
 - (c) A reporter of the Uganda Argus interviewed the said Fred Mpanga on 10th February 1963 and asked for confirmation or otherwise of rumours which had reached the said reporter to the effect that an order to withdraw the prosecution had been served on the said Fred Mpanga.
 - (d) The said Fred Mpanga then stated to the said reporter the matters published as aforesaid and such publication is a true and accurate report of the said statement. The heading and first paragraph of the said publication were based upon a statement made to the said reporter in the following words: “The Attorney-General of Uganda Mr. Godfrey Binaisa has instructed the Acting Director of Public Prosecutions, Mr. G. W. Farmer, to make an order to the effect that all criminal proceedings which are pending against Eriabu Lwebuga be immediately discontinued”.
 - (e) The said Fred Mpanga and the said reporter and the defendant and the public at large had a common interest in the said subject matter and the said publication.
3. Defendant denies that the said words meant or were understood to bear any of the meanings alleged in para. 4 of the complaint or any meaning defamatory of plaintiff.

4. In the issue of the Uganda Argus of 12th February 1963 defendant published in prominent type a statement made to it by the plaintiff, setting out the constitutional position of the Director of Public Prosecutions, and that the decision to withdraw the said prosecution was that of the plaintiff alone. Such statement was published at the request of the plaintiff made at an interview between plaintiff and the editor of the Uganda Argus on 11th February 1963 at which interview plaintiff did not request defendant to publish any form of apology. Defendant did on 21st February 1963 in reply to a letter from plaintiffs advocates offer to publish an apology in a form to be mutually agreed but no reply to such offer was received."

It should be noted that the averments contained in para. 4 of the written statement of defence to the plaint of the second plaintiff are substantially the same as those contained in para. 4 of the statement of defence set out above save that there is no mention of an interview with the second plaintiff or of any publication of an explanation at the request of the second plaintiff; and the date of the letter containing the offer of apology is February 27, 1963 instead of February 21, 1963.

Thus, on the pleadings the facts of publication of the article complained of, and that the said article referred to the first and second plaintiffs have been admitted. Apart, therefore, from the averments pleaded in para. 3 of the written statement of defence, which traverse generally the issue as to whether or not the article is libellous, the main defence put forward and which was vigorously argued on behalf of the defendants is that of qualified privilege. The grounds for the plea of qualified privilege and the particulars thereof are to be found in para. 2 of the statement of defence, wherein it is alleged in part:

"The publication was without malice and the occasion of publication was an occasion of qualified privilege."

para. 2 (b):

"The said prosecution and the withdrawal thereof were matters of great public interest."

and para 2 (e):

"The said Fred Mpanga and the said reporter and the defendant and the public at large had a common interest in the said subject matter and the said publication."

Before dealing with the plea of qualified privilege, it may perhaps be convenient at this juncture to summarise the evidence given in those cases.

The case of the plaintiffs is that in 1962 there was held a Constitutional Conference in London at which it was finally decided in the plenary session of the said conference that, in the exercise of his powers of entering a nolle prosequi in criminal proceedings, the Director of Public Prosecutions of Uganda should act entirely independently and should not be subject to the control of the Attorney-General or of any other authority. The object of that decision, the plaintiffs say, was to ensure that criminal prosecutions should be conducted or withdrawn without any political interference whatsoever. That decision was enshrined and enacted in s. 82 of the present Constitution of Uganda (hereinafter to be referred to as the Constitution).

In February, 1963, the first plaintiff became the Acting Director of Public Prosecutions of Uganda and acquainted himself with the powers of the Director of Public Prosecutions as contained in s. 82 of the Constitution. Then on February 9, 1963, the first plaintiff, acting as the said Director of Public Prosecutions, quite independently and without any directions, instructions by, or interference

of anyone else, including the second plaintiff, in the exercise of his powers under s. 82 of the Constitution, issued instructions that a criminal case against one Eriabu Lwebuga, then in Buganda court be discontinued. Those instructions were duly served on the Deputy Registrar of Buganda courts and the Attorney-General of the Kabaka's Government in Mengo, Buganda.

On February 11, 1963, in the issue of the Uganda Argus of that date, copy whereof has been exhibited in these proceedings and marked Exhibit A, there was published on the front page of that paper under the heading:

“Government stops Common Man Trial”

an article, the subject matter of these actions.

On reading that article, the first plaintiff, who felt personally aggrieved, immediately telephoned to the Editor of the Uganda Argus, Charles Ernest Harrison, (DW.1) with the intention and the purpose of correcting the wrong impression already created of, and rectifying the damage already done to the office of the Director of Public Prosecutions by the article.

In consequence of the telephone conversation between the first plaintiff and Charles Ernest Harrison (DW.1), the Editor of the Uganda Argus, there was published in the issue of the Uganda Argus, of February 12, 1963, Exhibit C under the heading “Lwebuga case adjourned” a statement purported to be a denial by the first plaintiff of the allegation that he had acted under the instructions of the second plaintiff in stopping the case against Eriabu Lwebuga.

The first plaintiff says that thereafter he was served with a summons, Exhibit B1, dated February 13, 1963, issued by the Kabaka's Principal Court at Mengo, Buganda, commanding his appearance before that court on February 15, 1963, to justify the “Order” of a nolle prosequi which had been entered by him in the case. That summons, Exhibit B1, was forwarded under cover of a letter, Exhibit B, dated February 13, 1963, to, and served upon the first plaintiff by the Acting Registrar of the Principal Court at Mengo.

In the meantime, on reading the article complained of, Grace Ibingira (PW.3) the then Minister of Justice, in whose Ministry the second plaintiff was, felt greatly concerned about it. He was surprised and shocked that it should have been alleged that the second plaintiff whose duty it was to maintain and uphold the constitution, had instructed the first plaintiff and the first plaintiff had accepted such instructions, contrary to the provisions of the constitution, to enter a nolle prosequi in the Eriabu Lwebuga case in the principal court at Mengo, Buganda. He at once interrogated the second plaintiff as to the truth of the allegation. The second plaintiff immediately denied having issued any such instructions to the first plaintiff and further assured Grace Ibingira (PW.3) that he was going to take steps to vindicate his good name and the good name of the Government.

It is the plaintiff's case that Grace Ibingira (PW.3) was greatly concerned about and disturbed by the allegation of the unconstitutional interference by the second plaintiff in the exercise of his powers by the first plaintiff and the subservience of the first plaintiff to such interference for two reasons. In the first place, the Constitution of Uganda has been the result of a compromise; and secondly the present government of Uganda has been formed by a coalition of two political parties commonly known locally as the U.P.C. (i.e. Uganda Peoples Congress) and the K.Y. (i.e. The Kabaka Yekka Party), the K.Y. being the party in power in the Kabaka's Government of Buganda in Mengo.

For the smooth working of Uganda Government, it was necessary that the provisions of the Constitution must not only be strictly adhered to, but that it must appear that that was so in fact. On

reading the article complained of,

Grace Ibingira (PW.3) foresaw political difficulties ahead and felt that the allegations therein contained would endanger the relationship between the Government of Uganda and Kabaka's Government of Buganda because the impression created by the article was that the Uganda Government as "symbolised" by the Attorney-General (i.e. The second plaintiff) had, in violation of the Constitution, usurped the powers and functions of the Director of Public Prosecutions by instructing the latter (i.e. The first plaintiff) to stop the prosecution of Eriabu Lwebuga in the court at Mengo and that the first plaintiff had succumbed to that usurpation of powers.

Then on February 15, 1963, it became necessary to provide the first plaintiff with police protection against a possible arrest by the Kabaka's Government Police at Mengo, and also for a statement to be made in the Uganda Parliament explaining the true position of the matter, both of which were done by the Minister of Justice, Grace Ibingira (PW.3). It was necessary that the first plaintiff be guarded by the officers of the Uganda Police because it was apprehended that the first plaintiff might be arrested by the Kabaka's Government Police at Mengo either on the order of the principal court or of the Kabaka's Government in default of his appearance at the principal court in answer to the summons, because it was alleged in the article complained of that the stopping of the prosecution was an act contemptuous of the principle court at Mengo.

The plaintiffs say that the nolle prosqui entered by the first plaintiff was treated with contempt by the principal court, which then had proceeded with the trial of Eriabu Lwebuga; and that Eriabu Lwebuga had therefore later to be released on the order granted by the High Court of Uganda on the application of Eriabu Lwebuga himself.

Thereafter from time to time it was necessary at a number of public meetings to deny the allegation that the prosecution of Eriabu Lwebuga was stopped by the first plaintiff on the instructions of the second plaintiff in breach of the provisions of the Constitution, and to assure such meetings that as was its duty the Uganda Government has always upheld and maintained and would continue so to uphold and maintain the Constitution.

The plaintiffs subsequently through their advocates addressed the letters Exhibits D1 and E1 to the defendants complaining of the article and demanding damages and an unconditional apology. In reply they received the letters Exhibits D2 and E2. The plaintiffs now further complain that since those letters the defendants have neither published any apologies nor offered them any damages for the injuries suffered by them in consequence of the alleged libel.

In their defence, the defendants have pleaded, as already stated, qualified privilege. They say that both the prosecution and the withdrawal of the case against Eriabu Lwebuga were matters of the greatest public interest, and that they had considered it their duty to publish a statement made to their reporter, Jenkins Kiwanuka (DW.2) by Fred Mpanga, the legal adviser to the Kabaka's Government in Mengo on the withdrawal of the case from the principal court.

It is the case of the defendants that on February 10, 1963, Jenkins Kiwanuka (DW.2) heard rumours to the effect that the case against Eriabu Lwebuga was being withdrawn from the principal court at Mengo. He immediately went and had an interview with one Fred Mpanga, the legal adviser to the Kabaka's Government in Mengo. The purpose of that interview was to confirm whether or not the rumours about the withdrawal of the case were true.

In the course of the interview, Fred Mpanga made a statement to Jenkins Kiwanuka (DW.2), who recorded the same in writing in his note book. When Jenkins Kiwanuka (DW.2) returned to the office of

the Uganda Argus, the statement was duly edited and appeared in the issue of the Uganda Argus of February 11, 1963, and is now the subject of these actions.

Then on February 12, 1963, as a result of a telephone conversation between Charles Ernest Harrison (DW.1) and the first plaintiff and at the request of the latter, a correction was inserted in the issue of the Uganda Argus of that date, Exhibit C. The defendants say that in the correction in the issue of the Uganda Argus of February 12, 1963, it was made clear that the decision to stop the criminal proceedings against Lwebuga was taken solely by the first plaintiff, who, under, the constitution has a complete and unfettered control over prosecutions in any court in Uganda.

The defendants admit having received the letters, Exhibits D1 and E1, and also having sent the letters Exhibits D2 and E2 in reply thereto. They say that they have always been willing and ready to publish an apology as demanded by the plaintiffs, but that having failed to receive any response from the plaintiffs as to the form of apology required, they had considered the matter closed until they were served with the complaints in these cases.

In his address to this court, counsel for the defendants, submitted that the article complained of was published on an occasion of qualified privilege in that the publication was on a matter of great public interest in which the public as a whole were concerned. He contended that the withdrawal of the case against Lwebuga from the principal court in Mengo was a matter on which the public ought to have been informed since the case had aroused great public interest and concern, it being a political case. It was therefore the duty of the defendants to publish the article for the information of the public.

Further, it was submitted that the plea of qualified privilege could only be destroyed by express malice on the part of the defendants of which there has been no evidence; and that the onus of proof of such malice rests squarely on the plaintiffs. Malice on the part of Fred Mpanga, it was contended, could not be attributed to the defendants. In support of these submissions counsel for the defendants cited and relied upon *Webb v. The Times Publishing Co. Ltd.* (1) *Smith v. Streatfield* (2), which was severely criticised and distinguished from *Langdon-Griffiths v. Smith and others* to the disadvantage of the former.

In reply to these submissions, it was contended by counsel for the plaintiffs, that on the authorities of *Chapman v. Ellesmere* (4), *Harrison v. Bush* (5) and *Adam v. Ward* (6), the plea of qualified privilege must fail. The onus of proof that the withdrawal of the case against Eriabu Lwebuga was a matter of great public interest, it was submitted, has not been discharged, nor has it been shown that in publishing the article complained of as they did, the defendants had an interest and duty so to publish it, and that their readers to whom the same was published, had a corresponding interest or duty to receive it.

I propose now to examine these important submissions of law in order to ascertain whether the plea of qualified privilege can be sustained on the evidence and in the circumstances of these cases.

The grounds for the plea of privilege are contained in para. 2 of the statement of defence wherein it is claimed that the prosecution and the withdrawal of the case against Eriabu Lwebugwa, were matters of great public interest in which Fred Mpanga, the reporter of the Uganda Argus, Jenkins Kiwanuka (DW.2) and the defendants and the public at large had a common interest.

The evidence of the defendants is that in consequence of rumours which then circulated to the effect that the case against Eriabu Lwebuga then in the principal court, Mengo, was being withdrawn, Jenkins Kiwanuka (DW.2) on his own initiative had gone and interviewed Fred Mpanga in Mengo for a story concerning that withdrawal. On that evidence, which I accept on this point, I think it is abundantly clear and I find as a fact, that the article complained of was published in the Uganda Argus of February 11, 1963, not specifically at the request of Fred Mpanga, nor because Fred Mpanga in the course and in the

discharge of his duty was himself particularly anxious to communicate the information concerning the withdrawal of the case through the medium of the press to the general public, but because Jenkins Kiwanuka (DW.2) was, as a reporter of the Uganda Argus, anxious to obtain a story for his newspaper.

On the admission of the defendants, Jenkins Kiwanuka, (DW.2), on his own volition, had decided to interview and did interview only Fred Mpanga on the rumours then in circulation that a nolle prosequi had been entered in the case in the principal court in Mengo. I am, however, unable to hold that even so that the article as published accurately and fully represents the statement purported to have been made by Fred Mpanga. Neither the original script taken by Jenkins Kiwanuka (DW.2) at the time nor any manuscript of a signed statement by Fred Mpanga was tendered and proved in evidence in the course of the trial. One would have thought that on a controversial matter of this kind a signed statement would have been obtained from Fred Mpanga by the reporter or at least a transcript of the original statement would have been readily available, particularly in view of the fact that Fred Mpanga was neither a party to nor a witness in these proceedings.

In making this latter observation, I must not in any way be understood as taking the view that Fred Mpanga should either have been a party to or a witness in these proceedings. A decision on that aspect of the case is entirely the responsibility of the parties concerned.

Fred Mpanga was described in the statement of defence as a legal officer upon whom the order withdrawing the prosecution of Eriabu Lwebuga was served on behalf of the plaintiff. In these proceedings he has been variously described as legal officer, legal adviser to the Kabaka's Government, a legal expert and civil servant. His position in the Kabaka's Government would appear to be somewhat obscure. It may be that he is an ordinary state attorney, but I think that there is evidence sufficient to enable me to find and I do so now find and hold that Fred Mpanga was a civil servant in the Kabaka's Government at the material time; and that he was neither the Attorney-General nor the Minister of Justice in that Government, and therefore could not be said to have been responsible for the policy of the Ministry of Justice, and in that regard to make any public statement on behalf of the Kabaka's Government. Nor is there any evidence, which I can accept, that it was he upon whom the order withdrawing the prosecution of Eriabu Lwebuga was served, and indeed as to what part, if any, he played in the prosecution of the case. He was neither the prosecutor nor the officer in charge of the courts.

Indeed, the only evidence which I accept on the question of service, is that the order (if order it must be called) of nolle prosequi was served upon the Deputy Registrar of the Buganda courts and the Attorney-General of the Kabaka's Government. It is therefore difficult to understand how it came about that Jenkins Kiwanuka (DW.2) should have decided on interviewing for a public statement, not the deputy registrar of the courts, nor the Attorney-General nor even the Minister of Justice in the Kabaka's Government, but a civil servant, who, on the evidence, had nothing whatsoever to do with the case.

On a consideration of the evidence, I am satisfied that neither Fred Mpanga nor Jenkins Kiwanuka (DW.2) nor the defendants had any interest or duty to publish to the public at large the article complained of in the issue of the Uganda Argus of February 11, 1963, Exhibit A, nor was there a corresponding interest or duty in the public to whom it was published to receive it. I hold that the article was nothing more than idle gossip.

I think the view I take on this point is supported by the case of *Hobditch v. MacIlwaine* (7) in which it was laid down as a matter of law that in order that the occasion upon which a defamatory statement is made may be privileged,

it is necessary that the person to whom such statement is made, as well as the the person making it, should have an interest or duty in respect of the subject matter of such statement. It is not sufficient that the maker of the statement honestly and reasonably believes that the person to whom it is made has such an interest or duty. (See also *Harrison v. Bush* (5), *Adam v. Ward* (6) and *De Buse v. McCartley* (8)).

It was also submitted for the defendants that the prosecution and the withdrawal of the case against Eriabu Lwebuga were matters of great public interest. The basis of this submission is by no means clear.

The article complained of was not the proceedings of the trial, nor of any proceedings in court, nor, indeed, was it a complaint directed to anyone either in the Kabaka's Government or the Central Government of Uganda in a position to grant redress. Surely if the trial of Eriabu Lwebuga was so important and of such public interest one would have expected the proceedings of the trial to have been reported in the Uganda Argus. Perhaps that was not considered necessary at the time. There is, however, no evidence that the actual trial was ever reported, although there is some evidence, which I accept, that the nolle prosequi was entered in the course of the trial; and that the court had proceeded with the trial notwithstanding the nolle prosequi entered with the result that Eriabu Lwebuga had subsequently to be released on an order of the High Court granted for that purpose.

Furthermore, under cross-examination, Charles Ernest Harrison (DW.1) admitted that he had considered the article complained of as representing a very clear view of the people concerned in the legal circles in Buganda on a certain action which had been taken. And when Jenkins Kiwanuka (DW.2) was asked:

“Q. This was a matter which would affect only the particular people in the legal circle of Buganda, and the Central Government, would it not? Was this a matter, this question of discontinuance of proceedings, was it primarily a matter which interested only a small section of the community?”

his answer was:

“A. A small section.”

From this, and taking the whole of the evidence into consideration, I draw the irresistible inference and hold that the withdrawal of the case against Eriabu Lwebuga by the Director of Public Prosecutions was not a matter of general public interest but was a matter of interest to a small section of people in Buganda. In the circumstances and for the reasons stated above I am firmly of the opinion that the plea of qualified privilege must fail. It is rejected.

There can be no legal authority or reason to suppose that the law would protect a general publication as in the instant case where there is only a sectional interest and a consequential duty to inform only a part of the public.

In *Chapman v. Ellesmere* (4), the publication of a decision of the stewards of a jockey club after an enquiry that a drug had been administered to a horse for the purpose of a race, as a result of which the horse was disqualified and the trainer, C. C. Chapman, was warned, to news agencies and in the Times, was held not to be privileged.

In considering the plea of privilege Lord Hanworth, M.R. [1932] 2 K.B. at p. 456) said:

“There remains the question whether the plea of privilege can afford protection to the defendants in respect of these paragraphs. But though the vehicle of the public press has been held to be a proper and protected

one, so as to defeat a claim for libel, where it has been used 'as the only effective mode' to answer a charge which had already received as wide a circulation (see *Adam v. Ward* and *Brown v. Broome*) there is no authority which protects the statement in the newspaper, where it is made not in answer, but as a fresh item on which a general interest, as distinguished from a particular interest already aroused, prevails."

In *Simpson and another v. Downs and Another* (9), the plaintiffs were contractors for erecting a gaol in Hull. The defendants were members of the Town Council, and from their business competent judges of the work. They published in a local newspaper a letter in which they charged the plaintiffs with serious omissions and deviations from the contract, for which libel the action was brought.

At the trial, qualified privilege was pleaded on the ground that the defendants were members of the Town Council and that the question at issue was the conduct of the plaintiffs as contractors for the gaol which was then being warmly discussed. It was also argued that in writing to the press the defendants were merely employing the privilege which belonged to every member of Parliament or of any other popular body, namely, that of explaining and defending their conduct, and that the charges were made on public grounds. It was held that the occasion was not privileged.

Holding as I do that the occasion of the publication of the article, the subject matter of these actions, was not privileged, it is therefore unnecessary for me to consider the question of express malice which was strenuously argued by counsel for the defendants as not having been established on the evidence, and also the several cases on the point to which I was referred.

That the article complained of is defamatory of the first and second plaintiffs has not been seriously contested by the defendants. Counsel for the defendants admitted openly that the allegation that the first plaintiff had acted under the instructions of the second plaintiff in discontinuing all criminal proceedings against Eriabu Lwebuga was incorrect; and that the defendants were not for a moment suggesting that the second plaintiff had instructed the first plaintiff to withdraw the case against Eriabu Lwebuga, nor that the first plaintiff "gets" instructions from the second plaintiff or from anyone else; and that that imputation being false, in the absence of qualified privilege, would give rise to a right of action by the plaintiffs.

Charles Ernest Harrison (DW.1) gave these pertinent answers to questions put to him under cross-examination:

- "Q. If you say that an Attorney General who is very largely responsible for advising his Government on matters like Constitution and other legal affairs, is acting contrary to the Constitution, would you not say that you would bring him into disrepute?
- A. I imagine it would.
- Q. You yourself, I take it, would think he was lacking in sincerity and integrity?
- A. I would say, if I considered he had deliberately contravened the Constitution, that that would be the position.
- Q. If a man deliberately acts in contravention of his powers under the Constitution that would be a grave reflection on his character, would it not?
- A. If he acted in contravention of his powers it would be.
- Q. Is that not the very thing you have published in this article?
- A. It may appear to be so."

Accepting the evidence of the plaintiffs and their witnesses as I do, and of the defendants' witness, Charles Ernest Harrison (DW.1), as to the meanings ascribed to the article and the effects thereof in so far as the evidence of the defendants' said witness is not inconsistent or in conflict with the meanings ascribed to the article complained of and the effects thereof by the plaintiffs and their witnesses, I am of the view that the article, the subject matter of these actions, is not only by its plain and obvious meaning defamatory of the plaintiffs, but that it is also capable of bearing, and I find as a fact that it does bear and was understood to bear, the meanings ascribed to it in paras. 4 and 5 of the first and second plaintiffs respective plaints.

In the words of Wilde, C.J. in *Sturt v. Blagg* (10) ((1847) 10 Q.B. at p. 908):

"With, or without, the innuendo, in either case, I think the plaintiffs are entitled to judgment; for the article in itself discloses a cause of action, and is also such as to justify the finding the truth of the innuendo."

I think it cannot be disputed that the article is a piece of reckless journalism – a very mischievous and irresponsible piece of writing. By falsely and recklessly alleging that the first plaintiff had acted under the instructions of the second plaintiff in ordering the Kabaka's principal court to discontinue all criminal proceedings against Eriabu Lwebuga, it certainly falsely charged both the first and second plaintiffs of having acted contrary to and in open violation of s. 82 of the Constitution and therefore dishonestly and in default of their respective duties and wanting in integrity.

The first and second plaintiffs were further charged falsely, I find, with unprecedented and unlawful interference with the course of justice; of deplorable and deliberate contempt of court; and of deliberately and dishonestly acting in a manner inconsistent with the interest of law and order and good government. These, I find, to be the plain meanings of the allegations in the article complained of, and which are entirely false. Surely these charges if true would be sufficient to render the plaintiffs unfit to hold their respective high public offices.

I turn now to consider the question of damages which, in my view and in the circumstances of these cases, is by no means an easy one. It is necessary, I suppose, to take into consideration not only the whole conduct of the first and second plaintiffs but also the whole conduct of the defendants from the time of the publication of the libellous article up to and at the hearing of these two cases. See *Praed v. Graham* (11) and *Smith v. Harrison* (12).

The defendants have maintained that by their letters, Exhibit D2 and E2 they had offered to publish apologies in an approved form, and that the explanation offered by the first plaintiff was duly and promptly published at his request in the issue of the Uganda Argus of February 12, 1963, Exhibit C. It is, however, to be noted that that explanation did not carry any word of regrets or of any apology which might have been some evidence that the original publication was not deliberate. The explanation was published as if it were an article under the title "Lwebuga case adjourned", which tended more to emphasize the adjournment of the case. Indeed the name of the second plaintiff was nowhere mentioned in that article. On the evidence, no attempt was made to contact the second plaintiff at all until the letter by his advocate, Exhibit E1.

It has also been said that a refutation of the allegations in the publication contained was announced over the radio, but it is not clear at whose instance it was so broadcast.

It is unfortunate that the offer to publish an apology was not pursued by the defendants especially as their letter, Exhibit E2, had suggested the possibility of a settlement of the matter to their mutual satisfaction. There was, of course, no direct offer of damages.

Counsel for the plaintiff has submitted that the plaintiffs are entitled to substantial damages because the damages caused them have been aggravated by the mode of publication, the circulation of the newspaper being at the material time 15,000 copies on the admission of the defendants; by the absence of any apology; by and the whole conduct of the defendants in failing to contact the second plaintiff at all after the publication of the article in question until the letter Exhibit E1.

The plaintiffs hold important public offices, the first plaintiff being then and now the Director of Public Prosecution, whose office is a highly responsible and difficult one. It is entrenched in the Constitution. The second plaintiff was and is the Attorney-General of Uganda, the chief legal adviser to the Uganda Government. He is also the leader of the Uganda bar.

The libel itself is a most damaging one in the circumstances disclosed by the evidence. I think it will be impossible to estimate the injuries, the indignity and humiliation which have been suffered by the plaintiffs in terms of money by reason of this libellous publication.

However, having given careful thought to the whole of the circumstances of these cases, I have reached the conclusion that the plaintiffs are entitled to substantial damages. I therefore do now assess the damages to which the first plaintiff is entitled at the sum of Shs. 40,000/-, and do award the same to him. I also do assess the damages to which the second plaintiff is also entitled at Shs. 50,000/-, and I do also award the same to him.

I assess the damages of the second plaintiff at that figure because since the publication of the article complained of and prior to the receipt of his advocates letter, Exhibit E1, no attempt was made to contact and check with him the accuracy of the allegations in the article in question; and, in the explanations published in the issue of the Uganda Argus of February 12, 1963, there was no mention at all of the second plaintiff.

Accordingly my judgment is as follows:

- (i) in respect to Suit No. 317 of 1963, I enter judgment against the defendants for the plaintiff in the sum of Shs. 40,000/- with costs; and
- (ii) in respect of Suit No. 349 of 1963, there will be judgment for the plaintiff in the sum of Shs. 50,000/- with costs against the defendants.

Order accordingly.

Judgment for the plaintiffs. Damages of Shs. 40,000/- and Shs. 50,000/- awarded to the first and second plaintiffs respectively.

For the first plaintiff:

Parekhji & Co., Kampala

C. W. Salter Q.C. and Y.V. Phadke

For the second plaintiff:

Binaisa, Ibingira & Co., Kampala

C. W. Salter Q.C. and Mboijana

For the defendants:

Wilkinson & Hunt, Kampala

Chester House Limited v Nairobi City Council
[1964] 1 EA 582 (CAN)

Division: Court of Appeal at Nairobi
Date of judgment: 28 September 1964
Case Number: 94/1962
Before: Sir Samuel Quashie-Idun P, Crabbe and Sir Clement de Lestang JJA
Sourced by: LawAfrica
Appeal from: Appeal from the Supreme Court of Kenya – Wicks, J.

[1] Rates – Valuation court – Appeal by rateable owner – Local authority not represented before valuation court – Appeal against valuation – Whether local authority can be joined as respondent on appeal.

[2] Appeal – Practice – Rates – Appeal by rateable owner – Local authority not represented before valuation court – Appeal – Whether local rating authority a proper respondent on appeal.

Editor's Summary

The appellant, who owned rateable property, being aggrieved by the value ascribed to his property by the valuer appointed by the Nairobi City Council to prepare a draft valuation roll, lodged an objection which was duly considered by the valuation court. The respondent Council, though duly notified, did not appear before the court but the valuer attended as he was required to do. The valuation court reduced the valuation of the appellant's property, but being still dissatisfied the appellant appealed to the Supreme Court naming the Council as respondent. At the hearing the Council successfully objected to being joined as respondent and its name was accordingly struck from the title of the proceedings. The reasons given by the judge were that the Local Government (Valuation and Rating) Act, 1956 was based on the Rating and Valuation Act, 1925 of England and that in England the Assessment Committee, which corresponded to the valuation court in the local Act, was the "necessary respondent" to an appeal, that naming the Council as respondent would not assist the appellant because the Council could not alter the values in the valuation roll and that the Council had neither appeared before the valuation court nor submitted an objection in writing. The appellant then appealed against the decision of the Supreme Court striking out the Council as respondent and contended that the Council could be joined as respondent because the law required the Council to be served with notice of the proceedings before the valuation court and it thus became a "notice party", because it had been the practice in the past to do so and because it was affected by the valuation and thus interested in an appeal challenging such valuation. It was submitted for the respondent Council that the proceedings before the valuation court were not inter parties since the Council did not appear (the valuer being present merely to answer questions as required by the Act), that only the parties before the valuation court should properly be parties to the appeal before the Supreme

Court, that the Council was not financially interested and that the appellant did not seek any relief against the Council.

Held –

- (i) since the Council could be adversely affected by the result of the proceedings and was thus directly interested the Council was a proper party to be cited as a respondent in an appeal from the decision of the valuation court;
- (ii) in the absence of express provision to the contrary, the court would hesitate to overturn the established practice whereby the Council, when not itself an appellant, had been made a respondent in such appeals.

Appeal allowed. Order striking out the Council as respondent set aside.

Cases referred to in judgment:

- (1) *Attorney-General v. Sillem* (1864), 2 H. & C. 431; 159 E.R. 178.
- (2) *Barnes v. Jarvis*, [1953] 1 W. L. R. 649.
- (3) *Labour Relations Board of Saskatchewan v. John East Iron Works Ltd.*, [1949] A. C. 134.
- (4) *R. v. Sunderland Justices*, [1901] 2 K.B. 357.

The following judgments were read.

Judgment

Sir Clement De Lestang JA: This is an appeal from the decision of the Supreme Court of Kenya striking out the Nairobi City Council, hereinafter called “the Council”, cited as respondent in an appeal to the Supreme Court lodged by the appellant against a decision of the Valuation Court under the Local Government (Valuation and Rating) Act, 1956, of Kenya. That Act provides, inter alia, for the valuation to be made periodically of every rateable property within the municipality of Nairobi, for their values to be entered in a valuation roll and for a rate to be levied thereon yearly. For that purpose it empowers the Council to appoint a valuer to prepare a draft valuation roll and any person aggrieved by any value ascribed in such draft valuation roll may lodge an objection with the town clerk within the prescribed period. The objection is in due course considered by a valuation court appointed by the Council and the town clerk, or some other person appointed by the Council, acts as clerk to that court. It is duty of the clerk to give notice of the day fixed for consideration of any objection by the valuation court to the Council, the objector and the owner of the rateable property, and any or all of these persons may appear, if they so wish, and be heard either in person or by an advocate or accredited representative and may call witnesses before the court. Although the Act does not expressly require the valuer to be notified, he must presumably be informed also as he is bound to attend the court and answer all questions which may be put to him. After hearing the objection the court either confirms or amends the draft valuation roll which, on being signed and certified by the President, becomes the valuation roll for the municipality of Nairobi.

Section 20 of the Act gives a right of appeal from the decision of the valuation court in these terms:

“Any person who has appeared before a valuation court on the consideration of an objection made before such court under this part of this Ordinance, or who has submitted an objection in writing to such valuation court, and who is aggrieved by the decision of such valuation court on the the objection, may appeal against the decision of such valuation court within one month from the date of the notice referred to in subsection (4) of s. 18 of this Ordinance –

- (a) to the Supreme Court, if such valuation court was appointed under s. 13 of this Ordinance; or
- (b) to a subordinate court held by a senior resident magistrate or a resident magistrate, if such valuation court was appointed under s. 14 of this Ordinance.”

Neither the powers of the Supreme Court on appeal nor the procedure to be followed for appealing are set out in the Act or prescribed by rules or regulations.

In 1959 a draft valuation roll was duly prepared in accordance with the provisions of the Act which I have outlined. It comprised the property of the appellant and ascribed to it a value of Shs. 1,452,000/-; the appellant being aggrieved by that value, lodged an objection which was duly considered by the

valuation court. The council, though duly notified, did not appear before the valuation court but the valuer attended as he was required to and he was not only examined but apparently even allowed to cross-examine the witnesses of the appellant. The valuation court in due course reduced the valuation of the appellant's property to Shs. 1,292,000/-. The appellant, being still dissatisfied with the amount of the reduction, lodged an appeal against the valuation court's decision to the Supreme Court naming the Council as respondent to the appeal. When the appeal came on for hearing the Council successfully objected to being joined as respondent and its name was accordingly struck out from the title of the proceedings. It is against the striking out of the Council as respondent to the appeal that the appellant appeals to this court.

Before considering the appeal proper it is convenient to refer briefly to the learned judge's reasons for holding that the Council was improperly named as respondent. There would appear to be three of them. The first is that the Local Government (Valuation and Rating) Act, 1956, (which I will call for short "the Act") is based on the Rating and Valuation Act, 1925, of the United Kingdom (hereinafter called the English Act) and that in England the Assessment Committee, which corresponds to the Valuation Court in the Act, is the "necessary respondent" to an appeal from the Committee's decision. Counsel for the respondent does not support the learned judge's view nor, with great respect, am I able to agree with this reason. While it is true that the schemes of both acts are substantially similar, the acts themselves nevertheless differ considerably both in wording and in certain important provisions. For example under the English Act the Assessment Committee is a permanent body. Under the Act the valuation court is appointed for each valuation roll. Again, in the event of an appeal, the English Act requires notice of the appeal to be given to the Assessment Committee and, if not the appellant, to the local authority and the rateable occupier.

The Act is completely silent as to who should receive notice. Moreover I cannot find anything in the English Act or in the passages from RYDE ON RATING which the learned judge quoted, to justify the inference that the Assessment Committee in England is the "necessary respondent". In fact it would seem that the Assessment Committee need not be respondent at all since, by the combined effect of the fourth schedule to the English Act and s. 31 of that Act, it is only the person required to be served, (viz: the Assessment Committee, the rating authority, etc.), who "may, if he thinks fit, appear as respondent to the appeal." It follows that, if the Assessment Committee concerned does not appear it does not become a respondent and the fact that Assessment Committees have been named as respondents in the English reported cases is probably due to their having appeared in the appeal.

The second reason was that the naming of the Council as respondents to the appeal would not assist the appellant because the Council could not alter the values in the valuation roll. But neither could the valuation court. It is clear that once the valuation roll has been certified and signed by the President of the valuation court no alteration may be made therein "affecting any valuation". This cannot mean, however, that if an appeal against a valuation is allowed by the Supreme Court its decision will be ineffectual. Were it so, the whole purpose of giving a right of appeal would be defeated. The court is not impotent to enforce its orders and I entertain no doubt that the valuation roll may be altered in obedience to an order of the Supreme Court on appeal.

The third reason given by the learned judge for striking out the name of the Council as respondent which was that it had neither appeared before the valuation court nor submitted an objection in writing, brings me to the real question for decision in this appeal. It is whether the Council was a proper respondent to the appeal or not.

Counsel for the appellant contended that it was for three reasons, viz.:

- (a) because the law required the Council to be served with notice of the proceedings before the valuation court and it thus became a “notice party”;
- (b) because it has been the practice in the past to do so;
- (c) because it is affected by the valuation and consequently interested in an appeal challenging such valuation.

Counsel for the respondent contended that the proceedings before the valuation court were not inter partes since the Council did not appear (the valuer being merely present to answer questions as required by the act) and that only the parties before the valuation court should properly be parties to the appeal before the Supreme Court, that the Council is not financially interested in the matter and that the appellant does not seek any relief against the Council.

To decide the question it is necessary to consider who may usually be cited as a respondent in any appeal. We were not referred to any authority on this point but, applying basic principles of practice, it seems to me that, generally speaking, no person may be cited as respondent to an appeal who was not a party to the proceedings before the tribunal from whose decision the appeal is made. The non-appearance of a person properly and duly notified of the proceedings before the tribunal does not, however, of itself prevent that person from being a party to those proceedings. Were it otherwise, a person who is a proper party to the original proceedings could defeat an appellant’s right of appeal at will by merely not attending. This cannot be. The true test, in my view, is whether that person is directly interested in the sense that it could be adversely affected by the result of the proceedings. It seems to me that the Council in the instant case comes fully within this test. The very fact that the Act requires notice of every objection to be given to the Council and empowers the Council to appear and be heard before the valuation court suggests the existence of a legal interest in the Council. And since the rate which the Council levies is based on the values in the valuation roll and, consequently, any diminution in those values is bound to affect the amount of rates collected, it follows, in my view, that the Council’s interest is a direct pecuniary one. It was, however, contended that it was not a pecuniary interest because if the values are reduced all the Council has to do is to increase the percentage of the rate to make up for the deficiency. In my view the ability of the Council to take steps to make good a deficiency in revenue caused by a reduction in values does not negative its having an interest in the valuation. Indeed, the very fact that it is forced to do something to protect its financial position shows that it is adversely affected by the valuation. Incidentally, unlike the local authority in England, the Council here is very closely identified with the preparation of the valuation roll. It decides when to have a valuation, it appoints the valuer, and the valuation court, of which its town clerk, or other nominee is clerk. What is more, the valuer may be, and, in the present case, was an employee of the Council. Although these matters cannot of themselves make the Council an interested party, they do emphasise the peculiar position of the Council and are consistent with that situation. For these reasons I am of the opinion that the Council was an interested party in the determination of the values ascribed to properties within the municipality for the purpose of the levying of rates under the Act and that the fact that it did not appear before the valuation court does not make it any less an interested party. It was consequently a proper party to be cited as a respondent in an appeal from the decision of the valuation court. Incidentally, this view has the merit of according with the practice hitherto followed by the Supreme Court. It is common ground that until this case the practice invariably was for the Council, if not itself an appellant,

to be made a respondent in such an appeal and in the absence of express provisions to the contrary I would hesitate long before condemning the established practice.

Furthermore, any other conclusion would lead to great difficulties. Four classes of persons are involved in an objection before the valuation court:

- (1) The valuation court itself. Both parties here seem to agree that that court ceases to exist the moment the valuation roll is signed and cannot consequently be made a respondent to an appeal. In any case it is not an interested party and it is unusual to cite a court as a respondent.
- (2) The valuer. He is required to attend before the valuation court to answer questions. He is therefore a witness and not a party.
- (3) The objecting rateable owner. He is the appellant in the present case.
- (4) The Council. If it is necessary, as would appear to be the case, to have a respondent, the Council is the obvious and only party to be named as such. There is no-one else.

It was contended that there was no lis between the rateable owner and the Council and that the Council could not be a proper respondent because it could not appeal.

It seems to me that both the rateable owner and the Council have a common interest in the rateable property being correctly valued in accordance with the Act, the former being liable to pay and the latter to levy a rate on such value. Any inflation of the value would benefit the Council to the detriment of the owner and vice-versa. Whenever, therefore, the value is in question there is in my opinion a clear issue between the owner and the Council.

As regards the right of appeal, the Council would have such right if it had either objected or appeared before the valuation court and cannot complain if it has lost that right by its own deliberate conduct. The fact that it chose not to appear before the valuation court does not make it cease to be party or respondent.

I would accordingly allow this appeal and set aside the order of the court below, striking out the Council as respondent together with the order for costs.

Sir Samuel Quashe-Idun P: I agree with the judgments of my brothers Crabbe and De Lestang JJ.A. and I also agree that the appeal should be allowed.

The appeal is accordingly allowed, the judgment and decree of the court below are set aside. The appellant to have costs in this court. The case is remitted to the court below for hearing.

Crabbe JA: I have found the question raised by this appeal a difficult one. It does not appear to have been settled by previous decisions; but I have been privileged to read in advance the judgment of De Lestang J.A. and not without hesitation I also agree that this appeal should be allowed.

In this appeal the court is called upon to determine whether in an appeal to the Supreme Court from a decision of the valuation court under s. 20 of the Local Government (Valuation and Rating) Act, 1956 of Kenya, the legislature contemplates some party being made a respondent. The answer to this question depends entirely, in my view, upon the true construction of the various sections of the Act. In attempting to do this I feel I ought to be guided by the advice of Pollock C.B. in *Attorney-General v. Sillem* (1) (1864), 2 H. & C. at p. 515):

“In endeavouring to discover the true construction of any particular clause of a statute the first thing to be attended to, no doubt, is the actual

language of the clause itself, as introduced by the preamble; 2nd, the words or expressions which obviously are by design omitted; 3rd, the connection of the clause with other clauses in the same statute, and the conclusions which, on comparison with other clauses, may reasonably and obviously be drawn . . . If this comparison of one clause with the rest of the statute makes a certain proposition clear and undoubted, the Act must be construed accordingly, and ought to be so construed as to make it a consistent and harmonious whole. If, after all, it turns out that that cannot be done, the construction that produces the greatest harmony and the least inconsistency is that which ought to prevail.”

And also by the salutary words of Lord Goddard L.C.J. in *Barnes v. Jarvis* (2) where he said:

“A certain amount of common sense must be applied in construing statutes. The object of the Act has to be considered.”

The object of the Local Government (Valuation and Rating) Act, 1956 of Kenya is stated to be “to empower local government authorities to value land for the purpose of rates; to enable such authorities to levy and collect rates; and for purposes incidental to or connected therewith”.

It is in pursuance of this object that the Nairobi City Council, acting under s. 5 of the Act, appoints a valuer to prepare a valuation roll of every rateable property within the municipality. The valuer thus appointed is clothed with very wide powers, including the power to enter upon, and inspect, any land within the municipality, and anyone who wilfully obstructs or hinders him is liable on conviction to a fine not exceeding Shs. 1,000/-. After the valuer has completed the draft valuation roll or draft supplementary roll and signed it he forwards it to the town clerk, who in turn places it before a meeting of the City Council, and thereafter the roll shall be available for public inspection, and the public are entitled to take copies or extracts from it.

There can be no doubt, I think, that the draft valuation roll is procured by the City Council in order to effectuate its object as declared in, or as can be gathered from, the Act.

The Act casts upon the town clerk the duty of publishing notice in respect of the draft valuation and draft supplementary valuation roll; and upon the local authority the duty of sending to every rateable owner of rateable property a notice of the valuation and apprising him whether or not there has been any change in the new valuation.

Any person, *including the local authority or any person generally or specially authorised in that behalf by the local authority*, who is aggrieved by the draft valuation rolls or supplementary valuation rolls may lodge an objection with the town clerk. I have deliberately italicized the foregoing words for purposes of emphasis. If the objector is the local authority or someone other than the rateable owner of the rateable property a copy of the notice of objection is served by the town clerk on the rateable owner. If the objector is the rateable owner the local authority is the only party that can be served with the notice of objection.

It seems to me, therefore, that wherever an objection is lodged there always arises an issue between the local authority on the one hand and the rateable owner or some other person as to whether the draft valuation is too high or too low. If the objector is the rateable owner or is someone else he will invariably say “Nay”, and the local authority which has caused the valuation to be made for the purpose of levying rates will say “Aye”. Thus, the function of the valuation court which is appointed under s. 13 of the Act to consider

the objection is the determination of an issue which closely resembles a lis inter parties. It is to “decide on evidence between a proposal and an opposition”, and observe the audi alteram partem rule.

“It is a truism that the conception of the judicial function is inseparably bound up with the idea of a suit between parties, whether between Crown and subject or between subject and subject, and that it is the duty of the court to decide the issue between those parties . . .”:

Labour Relations Board of Saskatchewan v. John East Iron Works Ltd. (3) ((1949) A.C. at p. 149).

It seems to me that a notice under s. 17(2)(3) is given to the local authority so that it goes to the valuation court and supports the valuation in the interest of the public. The valuation forms the bases on which the local council levies rates for each financial year. If the rates are not paid the local council, describing itself as plaintiff, can recover them by causing a summons to issue. The defaulting rateable owner of the rateable property becomes the defendant in the ensuing proceedings, and under s. 32 of the Act the valuation roll or any supplementary roll in force on the date on which the rate becomes due and payable is conclusive evidence of all matters included in such roll. In these circumstances I think it would be absurd to hold that the local council, which owes a duty to to the public to see that there are sufficient funds to provide amenities for the public, should look on unconcerned whilst one of its sources of revenue is being examined. It is clear, I think, the duty of the court to construe a statute as far as is fairly permissible to avoid absurdity.

In *The Dictionary of English Law* by the late Earl Jowitt (I-Z) at p. 1304 “Parties” are classified as follows:

“Parties to a proceeding are also divided into necessary and proper. Necessary parties are those who are interested in the subject-matter of the proceedings, and in whose absence, therefore, it could not be fairly dealt with: proper parties are those who, though not interested in the proceedings, are made parties for some good reason; thus, where an action is brought to rescind a contract, any person is a proper party to it who was active or concurring in the matters which gave the right to rescind.”

I have no doubt that in this case the Nairobi City Council was a necessary party, and it was the intention of the legislature that it should be notified of the objection so that if need be the valuation court could determine the objection in its absence. No one but the local council is clearly recognised by the legislature as having interest in upholding the valuation, if it can. Indeed, the whole legislative machinery on valuation and rating is set in motion by the City Council. In my view, even if the local council is not a necessary party it is at least a proper party.

That the legislature contemplates at least two parties before the valuation court is in my view clear upon examination of s. 16, sub-s. (6), and s. 21 (2) of the Act. Subsection (6) of s. 16 reads;

“(6) The procedure of a valuation court shall, subject to such regulations, if any, as may be made in that behalf by the Minister, be such as the court may determine, and every such court shall, unless the court otherwise orders on the application of any party to the matter then proceeding and upon being satisfied that the interests of either party would be prejudicially affected, sit in public.”

It seems that this subsection clearly says that upon the application by one of the parties to the court to sit in camera the valuation court must ensure before

granting such application that the interests of the applicant and the other party who is, or ought to be, before the court are not prejudicially affected.

It is provided in s. 21(1) that if during the consideration of an objection by the valuation court any question of law arises as to the principle on which the valuation is based, it shall be lawful for the court, on the application of any party to the proceedings to state a case for the consideration of the Supreme Court. Subsection (2) then provides as follows:

“On the hearing of a case stated under this section the Supreme Court may make such order as to costs as may seem just.”

If the Supreme Court exercises this power it may award costs either for or against the applicant or the other party who has appeared, or who has not appeared, but on whom notice of the objection has been served. The exercise of the discretion to award costs does not depend upon appearance at a hearing, but upon the fact of being a party in the proceedings, and being amenable to the jurisdiction. In my view, by vesting the Supreme Court with a discretion as to the manner in which costs should be awarded in proceedings of a case stated by the valuation court, the legislature clearly treats the matter as being in the nature of a “lis” between parties, and provides for the award of costs as in an ordinary litigation: see *R. v. Sunderland Justices* (4) ([1901] 2 K.B. at pp. 369, 370.

In determining therefore whether the Nairobi City Council are the necessary or proper respondents in this appeal it is necessary to look, as counsel for the City Council, counsel for the respondent, rightly pointed out during his argument before us, at what the position should have been before the valuation court. If they were a necessary party, or at least a proper party, which I think they were, then in my view they can be made respondents in this appeal.

There is yet another reason why I think that the appellants should succeed. It is admitted that it has been the practice in appeals under s. 20 of the Act to make the local authority the respondent. Indeed, the learned trial judge in his ruling said:

“As far as can be ascertained every appeal that has so far been brought against the decision of a valuation court has been launched with the municipality concerned stated as the necessary respondent. If Mr. Clark is correct the result will be that the appellant will be left without a respondent, a result which would be contrary to all precedent.”

When the construction of an obscure section of a statute has long been acquiesced in by the legislature and a certain settled practice has been evolved the court must be cautious in disturbing that practice, because the legislature may have approved of it. Thus, in *Maxwell on Interpretation of Statutes* (11th Edn.) pp. 296, 297 it is stated as follows:

“Moreover, the long acquiescence of the legislature in the interpretation put upon its enactment by notorious practice may, perhaps, be regarded as some sanction and approval of it. It often becomes, therefore, material to inquire what has been done under an Act, this being of more or less cogency, according to circumstances, in determining the meaning given by contemporaneous exposition.”

The practice of making the local authority respondent has not existed for long, but this court should be loath to overturn the law and practice which all lawyers and statesmen have tacitly accepted, unless there are strong grounds for doing so. In my view there are no such grounds in this case.

I do not think the legislature can be presumed to intend the anomalous situation that there should be no respondent in an appeal in the Supreme Court from a decision of the valuation court.

For these reasons I think the appeal should be allowed.

Appeal allowed. Order striking out the Council as respondent set aside.

For the appellant:

Hamilton Harrison & Mathews, Nairobi

Gerald Harris and J. N. Desai

For the respondent:

J. A. Mackie-Robertson, Q.C. and P. A. Clarke, Nairobi

Sunni Muslim Jamat v Commissioner of Income Tax [1964] 1 EA 590 (CAN)

Division:	Court of Appeal at Nairobi
Date of judgment:	17 November 1964
Case Number:	51/1964
Before:	Crabbe, Sir Clement De Lestang and Spry JJA
Sourced by:	LawAfrica
Appeal from:	The High Court of Tanganyika – LAW, J.

[1] Income Tax – Exemption – Charity – Religious institution – Institution owning building – Building comprising shops and flats – Small portion occupied by institution – Institution receiving rents – Rents applied to reduce debt to bank – Management undertaken gratuitously by trustees – Liability to income tax – Whether income from rents are “gains or profits from a business” – Whether income applied solely for charitable purposes – Meaning of “beneficiaries” – East African Income Tax (Management) Act, 1958, Schedule I, Part I, Head A, paragraph 29.

Editor’s Summary

The appellant, a religious charitable institution, owned a building which was condemned by the local authority and had to be demolished. It was replaced by a large building consisting of a committee room, a library, thirteen flats and eight shops to complete which the appellant borrowed from a bank a substantial sum. The appellant occupied a small portion of the building for its own purposes and the flats and the shops were let. The income from the rents was applied wholly to reduce the debt to the bank and the appellant was assessed to income tax on such income as gains or profits from a business. The appellant appealed against the assessment on the ground that the income from rents was exempt from tax under

para. 29 of Head A, Part I of the First Schedule to the East African Income Tax (Management) Act, 1958. The judge held that the appellant was carrying on business, that the rents were not applied solely to charitable purposes, that the work of letting was not mainly carried out by beneficiaries and accordingly the income from the rents was not exempt from liability to income tax. On further appeal it was contended inter alia that the income from rents was not included in the expression “gains or profits from a business” in the proviso to para. 29 and that the appellant was not carrying on business.

Held –

- (i) sub-para. of s. 3(a)(i) and (iii) of the East African Income Tax (Management) Act are mutually exclusive only in the sense that the same income cannot be charged to tax under more than one paragraph at the same time;
- (ii) where rental income is the result of a business, it is not excluded from the expression “gains or profits from a business”, and it is the sort of income to which the proviso to para. 29 *ibid.*, applies;

- (iii) in borrowing over half the cost of such a large building and in letting a major portion of it to the public the appellant had embarked on a commercial venture with a view to realising profits and was accordingly carrying on business;
- (iv) although the rental income of the appellant was gains or profits from a business, such income was exempted from tax under paragraph 29, *ibid.*, because it was applied solely to charitable purposes and the work in connection with the business of letting was mainly carried out by the beneficiaries of the appellant;
- (v) the word “beneficiaries” in sub-para. 2 of the proviso to para. 29, *ibid.*, means persons who benefit under the purposes of a charitable institution and the trustees of the appellant were beneficiaries within the meaning of that sub-paragraph;
- (vi) as the rental income was applied solely in reduction of the overdraft of the bank this constituted its application to the purposes of the charity.

Appeal allowed.

Cases referred to in judgment:

- (1) *Comr. of Inland Revenue v. The Birmingham Theatre Royal Estates Co. Ltd.* 12 T.C. 580.
- (2) *Coman v. Rotunda Hospital, Dublin (Governors)* 7 T.C. 517.
- (3) *Comr. of Inland Revenue v. The Marine Steam Turbine Co. Ltd.* 12 T.C. 174.
- (4) *Brighton Convent of the Blessed Sacrament v. Inland Revenue Comrs.* 18 T.C.76.
- (5) *Inland Revenue Comrs. v. Glasgow Musical Festival Association* 11 T.C. 154.

The following judgments were read:

Judgment

Sir Clement De Lestang JA: The questions in this appeal concern the liability to income tax under the East African Income Tax (Management) Act, 1958 (hereinafter called “the Act”), of Sunni Muslim Jamat, a charitable institution (hereinafter referred to as “the institution”). The institution was established over fifty years ago, its aims and objects being expressed in para. 2 of its constitution as follows:

- (i) The advancement of the tenets and doctrines of the said Sunni sect by religious teachings and Institutions tending to the edification and spiritual uplift and comfort of the members of the Sunni Jamat;
- (ii) The establishment and maintenance of Mosques and similar institution of worship for the members of the sect;
- (iii) The relief to such members of the sect who are poor and needy;
- (iv) To endeavour to bring to bear Islamic fundamentals and code upon the day to day life of Muslims;
- (v) To render help and facilities for the performance of religious rites on the occasions of marriages and death;
- (vi) To maintain cemetery and provide facilities for burials;
- (vii) To organise collections and disbursements of Zakat.

It owned an old and decrepit building in Dar-es-Salaam, which in 1956 was condemned by the local authority, and had to be demolished. It was replaced in 1959 by a new building consisting of a committee room, a library, a flat let

at a concession rate to a teacher, twelve other flats, and eight shops let to the public. The building cost Shs. 423,000/-, of which more than half was a loan from the building contractor who was himself a trustee of the charity. In January, 1960, this loan was transferred to a bank, which provided facilities for an overdraft of Shs. 200,000/- to the institution on the usual terms and on the security of the rents from the building. The general management of the building was undertaken by unpaid officers of the institution, the only paid employees being menial staff such as cleaners, gardeners, etc. Apart from donations, the institution derives all its income from rents received from the tenants of the flats and shops in its building, such income after deduction of normal outgoings, being wholly paid to the bank in reduction of its overdraft. The institution was assessed to income tax on such income for the years 1959 and 1960. It maintains, however, that such income is exempt from tax under para. 29 of Head A, Part 1 of the First Schedule to the Act, which reads as follows:

- “29. Subject to s. 25 the income of any institution, body of persons, or irrevocable trust, of a public character established solely for the purposes of the relief of the poverty or distress of the public, or for the advancement of religion or education, in so far as the Commissioner is satisfied that such income is to be expended either within East Africa or in circumstances in which the expenditure of such income is for purposes which result to the benefit of the residents of East Africa:

Provided that such income which consists of gains or profits from a business shall not be exempt from tax unless such gains or profits are applied solely to such purposes and either –

- (i) such business is carried on in the course of the actual execution of such purposes; or
- (ii) the work in connexion with such business is mainly carried on by beneficiaries under such purposes.”

Nothing turns on the first paragraph of para. 29 because it is conceded, for the purpose of this appeal at any rate, that the institution is a bona fide charitable institution within the paragraph, and that the income “is to be expended in East Africa”. That being so, the exemption would apply unless the institution both comes within the proviso and does not satisfy the conditions for exemption thereunder.

The first question for decision, therefore, is whether the rental income of the institution consists of gains or profits from a business. Counsel for the appellant’s contention that it does not is twofold. Firstly, he contends that the reference in the proviso to “gains or profits from a business” is a direct reference to s. 3(a)(i) of the Act to the exclusion of s. 3(a)(iii). Section 3 is the charging section and for the purpose of this case reads:

- “3. Tax shall . . . be charged . . . in respect of –
- (a) gains or profits from –
 - (i) any business . . . ;
 - (ii) any employment or services rendered;
 - (iii) any right granted to any other person for the use or occupation of any property; . . .”

It will be observed that gains or profits from a business are charged to tax under s. 3(a)(i), whereas gains or profits from rentals are charged under s. 3(a)(iii) and although I agree with counsel for the appellant that the use of the same expression, namely “gains or profits from a business” in the proviso to para. 29 implies a reference to s. 3(a)(i), I am unable to accept his contention that

rental income is thereby excluded from the ambit of the proviso. His contention rests on the submission that the sub-paragraphs of s. 3 are mutually exclusive. This is apparently so in England, but only, in my view, because the scheme of the English, income tax legislation so requires. In England income falling properly within one schedule cannot be charged on another. The necessity for this rule is not apparent in our legislation and I can see nothing in it to suggest that income falling appropriately within one sub-paragraph cannot be charged under another if it also falls under the latter. It seems to me that under our law the sub-paragraphs are mutually exclusive only in the sense that the same income cannot be charged to tax under more than one paragraph at the same time. Where, however, rental income is the result of a business", I can see no good reason to exclude it from "gains or profits from a business", which is the sort of income to which the proviso applies.

This brings me to the second leg of counsel for the appellant's contention, which is that the institution was not carrying on a business. He argued that it merely received rent and that, being a charity, it did not carry on a business by merely receiving rent, as it was not set up to do so. Whether a person, be he an individual, a company, or a charitable institution, carries on business or not is largely a question of fact depending on the particular circumstances of each case, and to a lesser extent a question of law in regard particularly to the correct inference to be drawn from the facts. Great regard must be had in every case to the definition of business in s. 2 of the Act, as including "any trade, profession or vocation"; trade being also defined as including "every trade, manufacture, adventure or concern in the nature of a trade".

A person may receive rent as an incident of his ownership of land, in which case he is of course not carrying on business, or he may be managing land on a commercial basis and with a view to the realisation of profits, in which case he is definitely carrying on business. In the final analysis it will be a question of degree whether it is the one or the other, bearing in mind "that when you are considering whether a certain firm or enterprise is carrying on business or not, it is material to look and see whether it is a company that is doing it" (per Rowlatt, J., in the *Comr. of Inland Revenue v. The Birmingham Theatre Royal Estate Co. Ltd.* (1). To that extent a charity, like an individual, should be treated less strictly than a company, but where the enterprise in which it is engaged is clearly a commercial venture, then its character is irrelevant. So in *Coman v. Rotunda Hospital, Dublin (Governors)* (2) where a hospital, which was a maternity hospital for poor people, owned a building which was let for the giving of concerts and other public entertainments and provided certain services as well and the Governors obtained revenue in that way, it was held that they were carrying on a trade, as distinct from merely letting out their property. By contrast, in the *Comr. of Inland Revenue v. The Marine Steam Turbine Co. Ltd.* (3), where a company ceased to operate and did nothing except the formal business of receiving royalties and distributing dividends to its shareholders, it was held that it was not carrying on a trade or business.

The learned judge in the court below held that the institution in the present case was carrying on a business, and applying the principles which I have enunciated to the facts which I have outlined above, I find myself in agreement with his decision. In borrowing over half the cost of the building, in erecting a building of which a very small portion is used in connection with the charity and the major portion consists of twelve flats and eight shops for letting to the public, the institution, in my view, embarked on a commercial venture with a view to realising profits. It became debtor in the process, and assumed responsibilities for the management and maintenance of the building, the letting of a relatively large number of units, and the collection of rents, etc.

I do not agree that the institution was compelled to enter into this business venture by circumstances beyond its control, as alleged by counsel for the appellant. Rather, I would say that it carried out a well-thought-out plan with a view to obtaining revenue. But even if I were to apply the test suggested by counsel for the appellant and asked myself whether an individual in similar circumstances would be carrying on a business, my reply would be unhesitatingly “yes”. I would, therefore, answer the first question in the affirmative.

The next question is whether the rentals were applied solely to charitable purposes, as required by the first paragraph of the proviso to para. 29.

The learned judge answered this question in the negative, but unfortunately in doing so he clearly misdirected himself. He said this – “Gains and profits applied in reduction of an overdraft granted to enable the construction of buildings, the income whereof will be solely applied to charitable purpose when the overdraft has been extinguished, are not in my opinion gains and profits applied solely to charitable purposes as the bank is the immediate beneficiary.” Although the bank is the recipient of the income, it is clearly not a beneficiary and also the proviso does not require that the income should be applied *immediately*. The adverb used in the proviso is “solely”, which is quite different.

Counsel for the appellant contends that it is not necessary that the income should be presently applied to charitable purposes, it being sufficient in his view that it is so applied in the future. He relies, in support of his contention, on the future tense used in the passage “in so far as the Commissioner is satisfied that such income is to be *expended either* within East Africa . . .” in the main body of para. 29. The proviso itself uses the present tense “are applied”, and the short answer to counsel for the appellant’s argument is that the main body of para. 29 does not apply where the proviso operates; that is to say where the income consists of gains or profits from a business, as it does here. The rental income was applied solely in reduction of the overdraft and the question for decision is simply whether this constitutes application to the purposes of the charity. I have found this the most difficult question raised in this appeal. At first I was inclined to lean in favour of the contention that it did not, but on further reflection would agree with counsel for the appellant’s contention that it was so applied. In the first place, if an institution is established solely for certain purposes, it is difficult to see how its income can be applied otherwise than solely for these purposes unless it acts *ultra vires*. Secondly, the proviso does not say that the income has to be distributed to beneficiaries of the charity. If a charitable organisation operating on a large scale in different spheres of charity makes profits out of a business and employees them in paying its headquarter’s expenses, or an institution pays such profits into a fund intended to build a school or hospital, I think it can quite fairly be argued that such income is being applied solely to charitable purposes. I do not think the present case is greatly different when the money is applied to reduce the institution’s indebtedness and when the purposes of the charity, and those purposes only, will ultimately benefit.

The last question is whether the work in connection with the business of letting was mainly carried out by beneficiaries under the purposes of the institution, as required by sub-para. 2 of the proviso.

The learned judge answered this question in the negative on the grounds that “these officers are not beneficiaries unless actually in receipt of charity”, which in his view they were not.

While I agree that the instance which he mentioned, namely the case of a blind man and woman working on business carried on by an institution for the blind so as to provide them with a means of livelihood, affords a classical example of the kind of beneficiary envisaged by the sub-paragraph, I am

not at all

convinced that it is necessary in every case that the beneficiary should be in receipt of charity as such. In *Brighton Convent of the Blessed Sacrament v. Inland Revenue Comrs.* (4), where it was held that the exemption applied, the nuns who carried on the school were truly in receipt of charity. They were housed, fed and clothed free of charge; but in the *Inland Revenue Comrs. v. Glasgow Musical Festival Association* (5) the beneficiaries did not receive charity. In that case the Association obtained an income from admission fees which were paid for attending its annual musical festival, in which choirs and singers competed, and which it was the Association's main object to promote and conduct. The whole of the income was applied exclusively to the Association's object, and the court decided that the competitors, as well as the general public, were beneficiaries of the charity, and that therefore the work in connection with the trade was mainly carried on by beneficiaries of the charity.

I think that ultimately one is driven to the meaning of "beneficiary" in the context; that is to say, a person who benefits under the purposes of the institution.

The purposes of the institution have already been stated in extenso and need not be repeated here. The business in the present case was carried on by trustees of the institution who, under the constitution, must belong to the Sunni Muslim sect and be chosen from among the members of the institution. It cannot be said that they derive no benefit from the charity. They benefit either directly or potentially from the use of the library and committee room and the right to attend religious teachings, to receive assistance and relief in case of need and facilities for burial and so forth. They are, in my view, beneficiaries within the meaning of the paragraph.

I would accordingly allow the appeal with costs, set aside the decision of the court below and direct that Assessments Nos. 21/6958 and 21/7944 be annulled.

Crabbe JA: I have reached the same conclusion, and, agreeing as I do, entirely with the judgment of my brother de Lestang, and his reasons therefor, I find it quite unnecessary to add any words of my own. There will be an order in the terms proposed by him.

Spry J: I also agree.

Appeal allowed.

For the appellant:

George N. Houry & Co., Dar-es-Salaam
K. Bechgaard and A. B. Patel

For the respondent:

The Legal Secretary, E.A. Common Services Organisation
G. C. Thornton (Deputy Legal Secretary, E.A. Common Services Organisation)

Siduwa Were v Uganda
[1964] 1 EA 596 (CAK)

Division: Court of Appeal at Kampala

Date of judgment: 14 October 1964

Case Number: 114/1964
Before: Newbold Crabbe and Spry JJA
Sourced by: LawAfrica
Appeal from: The High Court of Uganda – FUAD, J.

[1] Criminal Law – Murder – Misdirection – Evidence – Post – mortem performed when body decomposed – Cause of death not established – Medical evidence that death not due to natural causes – Possible that death caused by strangulation – Finding that death caused otherwise than by strangulation had been positively negated.

[2] Criminal law – Practice – Evidence – Medical witness allowed to hear evidence of prosecution witnesses – Medical witness unable to state cause of death – Objection by defence counsel to presence of medical witness overruled.

[3] Criminal law – Evidence – Confession – Part of confession rejected as untrue – Remaining part accepted as true – Rejected part inextricably interwoven with rest – Remaining part quite different if divorced from rejected part – Whether remaining part of confession should be accepted in evidence.

Editor's Summary

The appellant and the deceased were lovers and had frequently spent nights together at the appellant's house. There was no evidence of ill will or quarrel between them. On March 14, 1964, the appellant and the deceased spent the night at the appellant's house but next morning she was found dead in the appellant's bed and the appellant was missing. A post-mortem examination was carried out three days later when the body had decomposed and putrefaction had started. The doctor who carried out the post-mortem examination stated in evidence that he was unable to establish the cause of death, but as he found no sign of disease he was able to say that the deceased did not die from natural causes. He also said that if the condition of the body on March 15 was as described by witnesses (to whose evidence he had listened despite an objection for the defence) he would have suspected that the death was caused by manual strangulation; and that he found nothing inconsistent with strangulation. The appellant in a statement to the police, which was later repudiated and retracted, stated that he had with the assistance of two other persons strangled the deceased and that the other two persons had threatened to kill him if he refused to take part in killing the deceased. This statement the trial judge held was voluntarily given and was admissible. At the preliminary inquiry the appellant had given evidence on oath and had stated in cross-examination that he had gone to bed with the deceased and that when he woke up she was dead, that he did not know how she died and as he was frightened he ran away. At the trial the appellant made an unsworn statement the gist of which was the same as what he had said at the preliminary inquiry. The appellant was charged with murder and the judge in convicting him found that the deceased died of strangulation and that the appellant's subsequent actions were not the actions of an innocent person. On appeal,

Held –

- (i) there was no evidence to justify the judge's conclusion that the possibility of death having been caused otherwise than by strangulation had been positively negated and if the confession was excluded there was no sufficient evidence to justify the conviction of the appellant for murder;

(ii) in a criminal case if the defence object to an expert witness remaining in

court while other witnesses are giving evidence and before he has given evidence the judge should order the witness to leave the court; accordingly the judge should not have permitted the doctor to remain in court particularly when he had been unable to form an opinion of the cause of death from his post-mortem examination;

- (iii) when that part of a confession which is rejected as untrue is so inextricably interwoven with another part that such other part would become something quite different if it were divorced from the rejected part, then such other part should not be accepted as evidence save in most exceptional circumstances; accordingly the trial judge should not have accepted the confession as a confession that the appellant murdered the deceased;
- (iv) there was no sufficient evidence even to justify a conviction for manslaughter.

Appeal allowed. Conviction quashed and sentence set aside.

Cases referred to in Judgment:

- (1) *R. v. Sharmal Singh* (1962) E.A. 13 (P.C.); (1962) E.A. 762 (C.A.).
- (2) *R. v. Newman* 175 E.R. 541.

Judgment

Newbold JA: The appellant, a youth of about twenty-one years old, was convicted by the High Court, Uganda, of the murder on March 15, 1964, of a girl of about fifteen years old named Agoro.

The appellant and Agoro were lovers and had frequently spent the night together in the appellant's house. There was absolutely no evidence of any ill – will or quarrel between them. On the evening of March 14, 1963, the appellant, as he had frequently done in the past, collected Agoro from her aunt's house to spend the night with him. The following morning she was found dead in the appellant's bed and the appellant was missing. A number of witnesses saw the body of Agoro the next morning and, as the trial judge remarked, there were serious discrepancies in their evidence describing her condition. The trial judge, however, relied on the evidence given by a Muluka chief. His evidence was that the naked body of Agoro was lying on the bed of the appellant and was covered by a blanket. There were teeth marks on the face and above the breasts. The neck was swollen, the tongue protruding from the mouth, which was bleeding, and the eyes open and bulging. Dr. Kafero, the Senior Medical Officer (Forensic), performed a post-mortem examination on March 17, by which time the body was decomposed and swollen and putrefaction had started. Neither externally nor internally did he find any sign of injury. From the state of the body he was unable to ascertain the cause of death but as he found no sign of disease he was able to say that Agoro did not die of natural causes. He made a note that it would have been possible to strangle her without leaving any trace of injury. He stated that if he had seen the body on the morning of March 15, with the neck swollen, bulging eyes, the tongue protruding and blood coming from the mouth, he would have suspected manual strangulation but he would have been able to make sure by looking for bruising inside the neck. The doctor also stated that nothing he saw at the post-mortem examination was inconsistent with strangulation.

On this evidence the trial judge stated that the first matter to be decided was whether Agoro died a violent death. After reviewing the evidence the trial judge came to the conclusion that Agoro died a

violent death by strangulation (having regard to what the trial judge later stated we understood that he meant manual strangulation at the neck) and continued: “On the evidence as a whole the

reasonable possibility of her death being caused otherwise has been positively negative.” With respect to the trial judge we are unable to find any evidence which justifies his conclusion that the possibility of death being caused otherwise “has been positively negated”. At its highest, the evidence of Dr. Kafero was that death was not due to natural causes; that if the condition of the body on the morning of March 15, was as the evidence accepted by the judge stated it to have been, Dr. Kafero would have suspected manual strangulation; and that at the post-mortem examination nothing was found inconsistent with strangulation. At no time in his evidence did Dr. Kafero state that the postulated conditions were consistent only with manual strangulation – indeed his evidence that he would suspect that as being the cause of death carries the clear implication that the conditions were possibly consistent with other causes of death. We consider that this conclusion of the trial judge constituted a serious misdirection as it in effect precluded him from considering whether death may not have been caused in a number of other ways, for example, during a violent sexual embrace by pressure from an arm or elbow. The prosecution, as was stated by the Privy Council in *R. v. Sharmopal Singh* (1) (1962) E.A. at p. 15):

“... not only had to dispose of the defence set up but had also to prove that the evidence adduced by the prosecution was consistent only with murder. In their lordships’ opinion the inability of the medical evidence to speak with precision about the degree of force used, together with other circumstances in the case to which they will refer later, opened up both manslaughter and accident as alternative possibilities requiring consideration. It is now well established by a series of authorities, of which *Mancini v. Director of Public Prosecutions* [1942] A.C. 1, is the first and still the best known, that it is the duty of the judge to deal with such alternatives if they emerge from the evidence as fit for consideration, notwithstanding that they are not put forward by the defence. This may impose a heavy burden on the judge when, as in the present case, attention is concentrated by the defence on quite different issues. The use of the word “strangle” in the passage which their lordships have quoted is criticised by Mr. Dean, and it does seem to suggest that the judge was taking it as proved that the accused’s object, once the act was admitted, was to cause death.”

It is true that the trial judge did consider the possibility of both manslaughter and accident in the following passage from his judgment; but he does not appear to have considered those possibilities in the light of such medical evidence as there was as to the cause of death.

“I have to consider if there is any other defence open to the accused that arises reasonably from the evidence that I have accepted. The defence is a complete denial. The presence of the marks of bites above the breasts of the unfortunate girl is significant. Is there a reasonable possibility that the deceased’s death was accidental, or caused without intention as a result of some passionate sexual embrace so that the accused should be acquitted or convicted only of manslaughter? After careful consideration, the assessors and I were satisfied that no such possibility arises. I am of the opinion that the fact that she was strangled taken with the accused’s conduct militates against this possibility. I am satisfied that when the accused put his hands round the deceased’s neck (as he must have done) long enough and with sufficient force to take her life, he must have intended to kill her, or, as a reasonable man, must have contemplated such a result.”

It is not clear to us in what respect the trial judge considered the marks of bites to be significant nor why the judge was satisfied that no possibility of either manslaughter or accident arose. As we have stated, this passage makes it clear that the trial judge had come to the conclusion that death was caused

by the appellant deliberately putting his hands round Agoro's neck and throttling her. But the medical evidence was certainly not such as to rule out the possibility of other forms of strangulation and the possibility of either accident or manslaughter – in fact it was at least as consistent with either of these alternatives as it was with murder. As was said by this court in *Sharmal Singh v. R.* (1) ((1960) E.A. at p. 779):

“To strangle one's wife is only murder if the act of strangulation is done with the intention of killing or doing grievous harm or with knowledge that the act will probably cause death or grievous harm.”

We are satisfied that there is nothing in the evidence which we have set out so far which would even remotely support a conviction for murder and consequently that the trial judge must have relied almost entirely on the conduct of the appellant subsequent to the death and on a statement made by him to the police.

Before we set out the evidence relating to his conduct and the statement we consider it proper to refer to a matter raised by the trial judge in his judgment. At the request of the prosecution and in spite of objection by counsel for the defence the trial judge permitted Dr. Kafero to remain in court while the witness for the prosecution were giving evidence, which evidence included the condition in which the body was found on the morning of March 15. We consider that the judge was wrong in so doing. It is true that expert witnesses are normally permitted to remain in court while other witnesses are giving evidence, but in a criminal case if the defence object to an expert witness remaining in court before he has given his evidence the judge should order the witness to leave the court (see *R. v. Newman* (2) (175 E.R. at p. 546)). The object of Dr. Kafero remaining in court was obviously for him to form an opinion as to the cause of death from the evidence of the witnesses. As witnesses seldom give precisely the same evidence this may well result in selection of the evidence by the witness and this is the function of the judge. Even if the question asked of the expert witness postulate specific conditions, the witness may still be influenced by the testimony he has heard. In this case in particular the judge should not have permitted Dr. Kafero to remain as Dr. Kafero had been unable to form an opinion of the cause of death from his post-mortem examination.

We turn now to the evidence relating to the appellant's movements and acts subsequent to the death. As we have said, he was missing from his house on the morning of March 15 and it subsequently transpired that he had taken a boat belonging to John Namuye, who, together with Manuelli Odhiambo, set out in another boat to search for the appellant. On March 16 the appellant was sighted and pursued by John and Manuelli and as they drew near to the appellant he threatened to throw himself into the water but was persuaded not to do so. He was then arrested and taken by John and Manuelli to the Kamuli police station about 4 p.m. on March 16 and from there taken to Kayunga police station. On March 18 the appellant made a statement to Detective Station Sergeant Ojiwa, which statement was both repudiated and retracted by the appellant. The trial judge, after a proper enquiry held that the statement was voluntarily given in accordance with the relevant rules and was admissible. We accept this ruling of the trial judge, though the evidence cannot be said to have been entirely satisfactory. For example, Sergeant Ojiwa stated during his evidence: “I was instructed to take a statement under caution from the accused:” and also “I spoke to the accused in the cell – ‘I want to write your statement’. He said he would give one . . . I told him the statement would be about the murder of Agoro”; and the statement itself starts with the words: “I admit that I killed Agoro . . .” The relevant part of the statement is as follows:

"I admit that I killed Agoro for she is my girl friend. On 14.3.64 at 20.00 hours in the evening I went to the house of Safia Achola I called my friend at my house to sleep at mine. On 15.3.64 at 1.00 a.m. at night Manwere Ojambo s/o Aguje and John Namuye came to my house. They found Agoro sleeping. Manwere Ojambo said that father of Agoro is proud of his daughter, my money all spent on Agoro, we kill Agoro. John Namuye also said that let us kill Agoro. I refused to kill Agoro but Manwere Ojambo had a knife in his hand, he said if I refuse he could stab me with the knife. I agreed with them. The light was burning in the house light of firewood. Manweri Ojambo and I caught Agoro on the neck and John Namuye caught Agoro's legs. We strangled her until she died. Agoro was sleeping on her left side. She tried to get up we pushed her down she found injuries on the mouth and chest. Manwere Ojambo gave me Shs. 20/- for bus to escape to Kenya. John Namuye gave me his canoe to sail across Lake Kyoga."

At the preliminary enquiry the appellant gave evidence on oath and was cross-examined and the relevant part of his evidence is as follows:

"That the girl was my friend. I went to collect her to spend night with her. I was in deep sleep. When I woke up I tried to awaken her but she did not awake. I was afraid that somebody had died in my house. I took a canoe to go to Kamuli police station . . . I was sleeping in the same room as my girl friend. Then she died. I was afraid. That is why I ran away. I went to Busoga. I agree that I made a statement to the police but I was beaten on the head. I am not telling lies."

At his trial the appellant made an unsworn statement, the relevant parts of which are as follows:

"My name is Siduwa Were. The girl was my friend. I had been friendly with her for six months. Our friendship was a good one with no quarrels. That night I went and collected her to my house. We slept, then the next morning at 6 when I woke up I found the girl dead. As I had drunk very much, when I saw the girl was dead I was frightened so I went and took the boat of John which he used to lend me for fishing and went to the police . . . I told them the girl had died in a way I did not know and I was on my way to the police at Kamuli."

Having referred either in detail or in outline to what the appellant had said and done, the trial judge came to the conclusion that the appellant was absconding when he took the boat, that his action were not the actions of an innocent person and that the statement of the appellant in court was not a true statement and the trial judge stated that the result was that the defence must be rejected. Apart from the statement, which implicated the two persons who had pursued the appellant, his simple story, which at one stage he gave on oath, was: I went to bed with my girl; when I woke up she was dead; I do not know how she died; I was frightened and ran away. We see nothing in the medical evidence inconsistent with that story nor do we see anything inherently improbable in it. While there is no necessity to prove motive, the complete absence of motive must weaken whatever case there may be against an accused person. Even if the defence is rejected, that still does not mean that the prosecution has proved its case. We are satisfied that in order to have arrived at a conviction the trial judge must have relied, and relied almost entirely, on the appellant's statement to the police.

The judgment of the trial judge on this part of the case was as follows:

"I have not called the accused's statement to the police a 'confession' because it is well held that no statement which contains self-exculpatory

matter can amount to a confession if that matter, if true, would negative the offence allegedly confessed. Here, if all the statement were true, the defence contained in s. 16 of the Penal Code (which relates to 'compulsion') might be available to the prisoner. The statement in question, therefore comprises two elements – an inculpatory one (he admits killing the girl and helping to strangle her), and an exculpatory one (he alleges he was coerced by threats with a knife). I have not been able to find any authority in East Africa on this matter, but the question appears to be fully dealt with on pp. 245 and 246 of Sarkar on Evidence (10th Edn.). Since I am fully satisfied that the exculpatory part has been positively disproved by the testimony of John Namuye and Manuelli Odhiambo (I have no doubt the latter is 'the manueri Ojambo' referred to in the statement), I think I am entitled to accept against the accused the inculpatory part of his statement. In these circumstances I think it would be unwise to rely upon the statement alone to convict the accused. Prudence requires that I should look for some corroborating evidence, though the accused's statement was clearly repudiated. There is the circumstantial evidence to which I have referred, which, of itself, might not be enough to found a conviction. But taking that evidence with the inculpatory part of the statement which, I believe, an overwhelming case is, in my opinion, made out against the accused."

While it is clear law that a confession must be taken as a whole, it is also clear law that it need not be believed or disbelieved as a whole. It is open to a trial judge to accept a part of a statement and to reject another part. Where, however, the part which is rejected is so inextricably interwoven with another part that such other part would become something quite different if it were divorced from the rejected part, then we consider that it is not open to a judge to accept such other part save in the most exceptional circumstances. We consider that this is what the trial judge did in this case, and he did it in circumstances which, so far from requiring the acceptance of a part of the confession, required the exercise of the greatest caution before any part of the confession was accepted. The confession was that the appellant and two others jointly murdered Agoro in circumstances in which the appellant was first induced to do so by the others and then threatened. The trial judge has rejected as untrue the confession in so far as it states that the two others played any part in the murder, but has accepted it as a confession that the appellant alone and of his own volition murdered Agoro. But the appellant made no such confession. If it is accepted that the two others played no part in the murder then to accept the statement as a confession that the appellant alone and of his own volition murdered Agoro is to accept as a confession something quite different from what the appellant said.

From the evidence we have set out it is clear that if the confession is excluded there is no sufficient evidence to justify the conviction of the appellant for murder. The confession, for the reasons we have stated, should not have been accepted as a confession that the appellant murdered Agoro. For the same reasons there is no sufficient evidence to justify a conviction for manslaughter. Accordingly it is clear that the conviction and sentence of death should be quashed and we so order.

Appeal allowed. Conviction quashed and sentence set aside.

The appellant in person.

For the respondent:

The Director of Public Prosecutions, Uganda

P. Sebala (State Attorney, Uganda)

William James Baker v Joseph Peter Rush

[1964] 1 EA 602 (CAN)

Division: Court of Appeal at Nairobi
Date of judgment: 9 October 1964
Case Number: 21/1964
Before: Newbold Sir Clement De Lestang and Duffus JJA
Sourced by: LawAfrica

[1] Practice – Appeal – Preliminary decree – Extension of time – Action alleging breach of contract – Issue of liability tried first – Finding for plaintiff – Proceedings adjourned for assessment of damages – Damages assessed after one year – No appeal lodged within prescribed time upon issue of liability – Application for extension of time for appeal upon issue of liability after damages awarded.

Editor's Summary

The respondent sued the applicant claiming damages for breach of contract and, by agreement of the parties, the issue of liability was heard first and was determined on April 11, 1963, in favour of the respondent. The applicant filed notice of appeal but failed to lodge the record of appeal within the prescribed time. On April 11, 1964, the court gave judgment awarding the respondent Shs. 599,000/- in damages. The applicant again filed notice of appeal not only against the decision of April 11, 1964, on damages, but also against the earlier decision of April 11, 1963, on the issue of liability. The applicant, being unable to lodge the record of appeal within the prescribed time, applied for an extension of time. The main point for decision was whether the decision on the issue of liability was a preliminary decree and it was submitted for the applicant that it was not but that it was a mere finding upon an issue.

Held – the decision on the issue of liability was a preliminary decree and as the application for extension of time was hopelessly out of time it was incompetent.

Application for extension of time to lodge record of appeal granted upon the condition that such appeal be restricted to the quantum of damages.

Cases referred to in judgment:

- (1) *Chanmalswami v. Gangadharappa* (1914) 39 Bom. 339.
- (2) *Sidhanath Dhonddev v. Ganesh Govindi* (1912) 37 Bom. 60.
- (3) *Tzamburakis and Another v. Rodoussakis* (1958), E.A. 400 (P.C)
- (4) *Coverji Luddha and Another v. Morarji Punja* (1885), 9 Bom. 183.
- (5) *Maharajah Moheshur Singh v. Bengal Government* (1859), I.A. 283.
- (6) *Champion Motor Spares Ltd. v. Barclays Bank D.C.O. and Another* (1964), E.A. 385 (C.A.).

Judgment

Sir Clement De Lestang JA, read the following order of the court: This is an application for extending the time for filing the record of appeal. It arises in this way. The applicant was the defendant in an action by the respondent in the Supreme Court of Kenya for damages for breach of contract. By agreement of the parties the issue of liability was determined first and on April 11, 1963, the Supreme Court decided that issue in favour of the respondent. The applicant gave notice of appeal but failed to lodge the

record in time. An application for extension of time made to a single judge of this court was dismissed and a further application for review of that decision by the court was withdrawn. There matters rested when on April 11, 1964, the Supreme Court delivered judgment on the issue of quantum of damages awarding the respondent Shs. 599,000/-. The applicant again filed notice of intention to appeal not only from the decision of April 11, 1964, on damages but also from the decision of April 11, 1963, on liability. He did not, however, lodge the record of appeal within the time prescribed; hence the present application.

Insofar as the application relates to a proposed appeal against the decision on damages we consider that the delay has been satisfactorily explained and that there are sufficient reasons for extending the time for lodging the record of appeal.

Insofar as the application relates to a proposed appeal against the decision on liability it is hopelessly out of time and, therefore, no longer competent unless it is not caught by s. 68 of the Civil Procedure Act. That section provides that:

“Where any party aggrieved by a preliminary decree passed after the commencement of this Act does not appeal from such decree, he shall be precluded from disputing its correctness in any appeal which may be preferred from the final decree.”

The short point for decision here is whether the decision on liability is a preliminary decree or not. If it is not then, subject to the effect of the existing order refusing leave to extend time, the two appeals should not be treated differently. It is surprising that while there are in the Law Reports innumerable instances in which the court has entertained appeals from decisions on issues of liability, this point has never come up for express decision. It seems to be assumed generally that a decision on liability in the first instance could be nothing else than a preliminary decree. Counsel for the applicant contends, however, that this assumption is wrong and that a finding on an issue of liability is not a preliminary decree but a mere finding on an issue, that practically every true preliminary decree is referred to as such in the Civil Procedure Act itself, forms being provided therefor, namely preliminary decrees for foreclosure, redemption and sale and under Order 20, rr. 12, 13, 14, 15 and 17, and that in any event to constitute a decree the decision must give a relief or order something to be done as otherwise it does not determine the rights of the parties.

Counsel for the respondent, on the other hand, relies on the definition of decree in s. 2 of the Act to support the opposite contention.

The definition, in so far as relevant here, reads:

“ ‘decree’ means the formal expression of an adjudication which, so far as regards the court expressing it, conclusively determines the rights of the parties with regard to all or any of the matters in controversy in the suit and may be either preliminary or final. . . .

Provided that for the purposes of appeal the word ‘decree’ shall include judgment and a judgment shall be appealable notwithstanding the fact that a formal decree in pursuance of such judgment may not have been drawn up or may not be capable of being drawn up.

Explanation. – A decree is a preliminary when further proceedings have to be taken before the suit can be completely disposed of. It is final when such adjudication completely disposes of the suit. It may be partly preliminary and partly final.”

Except for the proviso this definition is identical with that in the Indian Code of Civil Procedure of 1908. Prior to the decision in *Chanmalswami v. Gangadharappa* (1), the Indian Courts had repeatedly held that decisions on such points as misjoinder, limitation, jurisdiction and various others arising in the course of a trial were preliminary decrees. The view was expressed in that case by the learned judges who referred it to a full bench that those decisions were wrong and went too far. It appeared to them “that virtually every true preliminary decree is actually provided for in the Code itself”. The full court itself dealt briefly with the matter and did not go further than hold that a decision in favour of the plaintiff upon a preliminary defence that the matters in dispute are caste questions outside the jurisdiction of the court (which was the question for decision in the case) does not amount to a preliminary decree. It also expressly over-ruled *Sidhanath Dhonddev v. Ganesh Govindi* (2), in which it was held that decisions as to misjoinder, limitation and jurisdiction are preliminary decrees. *Chanmalswami’s* case (1) was expressly approved by the Privy Council in *Tzamburakis and Another v. Rodoussakis* (3), and while we respectfully agree with that decision it is not, in our view, authority for the proposition that a decision on a question of liability also is not a preliminary decree.

Counsel for the applicant also relied on *Coverji Luddha and Another v. Morarji Punja* (4). It was held in that case that an order by which it was declared that the defence were liable to pay half of whatever sum the Government Surveyor might certify to be due in respect of certain contracts was not a decree as it clearly was not an adjudication which decided the suit since it reserved to the court the further consideration of the case when the plaintiff should have produced the surveyor’s certificate. That was a decision under the Indian Code of 1882 in which, leaving out the inapplicable words, decree is defined as the formal expression of an adjudication upon any right claimed . . . where such adjudication . . . decides the suit . . . This definition is very different from that in the Kenya Act. In particular it will be observed that under it an adjudication, in order to constitute the decree, must have *decided the suit*. Under the definition in the Kenya Act it is sufficient that *it conclusively determines the rights of the parties* though not deciding the suit itself. Consequently that case is no authority on the point under consideration.

To decide the point it is necessary to examine the definition itself. It seems to us that to constitute a decree there must be the following essential elements:

- (a) there must be an adjudication;
- (b) the adjudication must have been given in a suit;
- (c) it must have determined the rights of the parties with regard to all or any of the matters in controversy in the suit;
- (d) such determination must be a conclusive determination.

As regards (a) there can be no doubt that there was an adjudication on April 11, 1963. We are informed that the trial of the issue of liability lasted something like eight days and that the learned judge delivered a long written judgment.

As regards (b) the adjudication was clearly in a suit.

As regards (c) and (d) the plaintiff was claiming damages for breach of contract. In such a claim he must establish both a right to damages founded on proof of the breach and the amount of those damages. It was that right which was determined and determined conclusively as far as the trial court was concerned. It was contended that a decision which does not give a definite relief is not a decree. In our view this goes too far. In *Chanmalswami’s* case (1) in the course of the argument Scott, C.J., said:

“The court has to consider ‘rights’ with reference to the matters in controversy.”

It seems to us that if the court gives a decision on the rights with regard to which relief is sought that decision is a decree as it comes squarely within the ambit of the definition. This is the position here. The decision conclusively determined the respondent’s right to damages, the only right on which he claimed damages. We cannot bring ourselves to accept the proposition that such a decision is not a decree.

We are mindful of the following passage in *Maharajah Moheshur Singh v. The Bengal Government* (5), (1859) 7 Moo. I.A. at p. 302), in which their Lordships of the Privy Council said at p. 345:

“We are not aware of any law or regulation prevailing in India which renders it imperative upon the suitor to appeal from every interlocutory order by which he may conceive himself aggrieved, under the penalty, if he does not do so, of forfeiting for ever the benefit of the consideration of the appellate court. No authority or precedent has been cited in support of such a proposition, and we cannot conceive that anything would be more detrimental to the expeditious administration of justice than the establishment of a rule which would impose upon the suitor the necessity of so appealing; whereby on the one hand he might be harassed with endless expense and delay, and on the other inflict upon his opponent similar calamities.”

Far be it from us to quarrel with this passage with which, in any case, we are in respectful agreement. The position is, however, quite different when what the party seeks to appeal from is not an ordinary interlocutory order but a decision on the right of his opponent to have damages against him. Such a decision is not like decisions on misjoinder, jurisdiction, limitation and so forth which to use the words of Hayward, J., in *Channalswami’s* case (1) have “only the effect of regulating procedure and decided none of the rights of the parties” as does the decision under consideration.

For these reasons we agree with the view of Crawshaw, J.A., in *Champion Motor Spares Ltd. v. Barclays Bank D.C.O. and Another* (6), (where the matter was not argued) to the effect that in Uganda where similar provisions exist a decision on liability in the first instance is a preliminary decree. We are therefore of the opinion that the decision of April 11, 1963, was a preliminary decree and as no appeal was lodged against it in time no appeal is now competent.

There remains one other point to mention. It transpired in the course of the arguments that the notice of intention to appeal from the decree of April 11, 1964, was not served in time on the respondent. Counsel for the applicant then applied to amend his application to include an application to extend the time within which this could be done. The reason for the failure was sufficiently explained and, rightly, counsel for the respondent did not oppose the application. We would accordingly grant it and extend the time so as to validate the service which was made out of time. The question of imposing a condition in relation to past costs if an extension of time for lodging the appeal was granted was raised by the respondent having regard to the fact that the appellant is out of the jurisdiction. As the costs in the Supreme Court have not yet been taxed we do not think it appropriate to impose such a condition at this stage, but if the appeal is lodged the respondent may, of course, apply under r. 60.

For these reasons we order that the time for lodging the appeal from the decree of April 11, 1964, be extended by thirty days from the date of this order subject to the condition that any such appeal be restricted to the judgment given

on that date on the issue of quantum of damages. The respondent will have the costs of this application in any event.

Application for extension of time to lodge record of appeal granted upon the condition that such appeal be restricted to the quantum of damages.

For the applicant:

Hamilton Harrison & Matthews, Nairobi

Bryan O'Donovan, Q.C., K. Bechgaard, Q.C., and N. V. Pancholi

For the respondent:

Marsh & Tagart, Nairobi

Clive Salter, Q.C., and M. Da Gama-Rose

Triloknath Bhandari & another v S R Gautama
[1964] 1 EA 606 (CAM)

Division:	Court of Appeal at Mombasa
Date of judgment:	13 November 1964
Case Number:	74/1963
Before:	Sir Samuel Quashie-Idun P, Newbold and Spry JJA
Sourced by:	LawAfrica
Appeal from:	The Supreme Court of Kenya – Pelly Murphy, J.

[1] Practice – Evidence – Cross-examination – Right to cross-examine – Action on promissory note – Note for monies lent and professional services rendered – No evidence being called to controvert presumption that promissory note given for good consideration – Cross-examination of plaintiff regarding details of professional services rendered disallowed.

[1] Evidence – Cross-examination – Right to cross-examine – Cross-examination of plaintiff on material issue disallowed – Defendants not calling controverting evidence.

Editor's Summary

A business woman had given the respondent a promissory note for Shs. 47,000/- for monies lent to her and for professional services rendered to her in respect of her business. She later transferred the business to the appellants and the respondent sued her and the appellants as transferees of the business for Shs. 36,400/- being the balance due on the note. The claim against the appellants was based on their statutory liability as transferees of the business under Transfer of Business Act (Cap. 500). At the trial counsel for the appellants sought to cross-examine the respondent regarding the amount representing the alleged

professional services in order to show that this liability was not concerned with the business transferred to them. The judge after ascertaining that the appellants did not intend to call evidence to controvert the presumption that the promissory note was given for good consideration, refused to allow this cross-examination of the plaintiff. On appeal,

Held –

- (i) having regard to the issues to be tried, the judge was wrong in not allowing questions to be put to the respondent to show the nature of the alleged professional services rendered;
- (ii) that counsel for the appellants had stated that he was not calling evidence to controvert the presumption that the note was given for good consideration did not deprive counsel of his right to question the respondent;
- (iii) the denial of the right of the appellants' counsel to cross-examine the respondent on vital issues rendered the trial unsatisfactory; the appeal would therefore be allowed.

Appeal allowed. Judgment set aside and case remitted to the Supreme Court for retrial.

No cases referred to in judgment:

The following judgments were read:

Judgment

Sir Samuel Quashie-Idun P: The plaintiff, S. R. Gautama, now deceased, filed a plaint against Mrs. Kulsumbai Kassamali Kent and the appellants claiming from the defendants jointly and severally the sum of Shs. 36,400/- being balance of amount due on a promissory note made by the first defendant on April 30, 1957, for the sum of Shs. 47,000/-.

It is alleged in the plaint that the amount claimed was the balance due for monies lent to the first defendant who carried on business known as Mainland Stores and for professional services rendered to the first defendant in respect of her business. The claim against the second and the third defendants was instituted against them because the first defendant had sold her business to them, notice of the said sale and transfer having been published in the Kenya Gazette No. 4059 of November 26, 1957.

The first defendant filed a defence to the plaint alleging that certain conditions undertaken by the plaintiff before the transfer in the property on the note could be effective had not been fulfilled. She also alleged misrepresentation on the part of the plaintiff and pleaded that the plaintiff had contravened the provisions of the Money-Lender's Ordinance. The first defendant did not appear at the trial to defend the suit although appearance was entered for her by her counsel.

In their defences, the second and third defendants pleaded that the plaint did not disclose a cause of action against them and denied that the liability if any incurred by the first defendant was in respect of the business of Mainland Stores.

On the pleadings filed, the following issues appear to have been agreed to be tried – viz.:

- “1. Was the defendant No. 1 indebted to the plaintiff?
2. If so, what was that amount?
3. If the answer to Q.1 is in the affirmative was the liability ascertained by issue 2 or any part thereof incurred in the business.
4. Is the business referred to in issue 3 the business of which defendants 2-3 are the transferees?”
5. Was the plaintiff money lender within the meaning of the money lender's Ordinance and, if so, are the loans made or securities given enforceable?”

At the hearing the second and third defendants were represented by one counsel who sought to put questions to the plaintiff in respect of the amount representing the alleged professional services rendered to the first defendant by the plaintiff. This was disallowed by the court on an objection taken by counsel for the plaintiff. The following notes made by the learned trial judge appear in the record of proceedings:

“Court to counsel for the second and third defendants: Are you going to call evidence to contravert the presumption which is raised on the face of the pro note that it was given for good consideration and in the course of the business?”

Counsel: No.

Court: Then I shall not allow further cross-examination as to what professional services were rendered, etc.”

At the resumed hearing of the case further arguments were advanced as to the consideration in the promissory note and as to the right of the second and third defendants to cross-examine the plaintiff to show that the second and third defendants were not bound by the promissory note because the liability incurred by the first defendant was not in the course of the business which had been transferred to them.

The learned trial judge then put a question to counsel for the second and third defendants if he was calling evidence to contravert the presumption raised on the face of the promissory note that it was given for good consideration and in the course of business. Upon counsel replying in the negative, the court disallowed further cross-examination as to what professional services were rendered. After further arguments, the court made the following ruling:

“I do not think that I am required to decide whether or not the second and third defendants would be entitled to lead evidence to contradict or vary the terms of the promissory note or to show that the bill was not executed by the first defendant in the course of the business of Mainland Stores and that the professional services and money lent by the plaintiff were not lent for the purposes of the business. It may be that they would be entitled to do so and thus displace the presumption that the promissory note is what it purports to be and that it was given by the first defendant in her capacity as proprietress of Mainland Stores. But in the present case counsel for the defence of both the second and third defendants has informed the court that he does not propose to call evidence to contravert the evidence given by the plaintiff that the consideration for the promissory note was money lent for the purposes of the business and that the professional services rendered to the first defendant were rendered to her as proprietress of the business. Notwithstanding this, counsel submits that he should be allowed to cross-examine the plaintiff in detail about the professional services which he rendered.

In my opinion further cross-examination on the lines which counsel for the defendant seeks to pursue cannot be allowed in the circumstances to which I have referred and I decline to allow such cross-examination.”

After this ruling the trial continued and, finally, the court gave judgment for the plaintiff against all the defendants.

In this court two grounds of appeal have been argued on behalf of the appellants, namely:

- “1. The learned judge erred in law in holding that the appellants were not entitled to cross-examine the respondent as to the details of the professional services mentioned in the promissory note; and that the appellants were not entitled to go behind the promissory note.
2. The learned judge erred in law in not holding that the entire burden of establishing the liability of the appellants to the respondent was on the respondent.”

I think that, having regard to the issues to be tried by the learned trial judge, he was wrong in not allowing questions to be put to the plaintiff to show the nature of the alleged professional services which the plaintiff said he had rendered to the first defendant in the course of the business which was sold to the second and third defendants: the trial judge was also wrong in disallowing questions to be put to the plaintiff to show that the liability incurred by the

first defendant on the promissory note was not incurred in the business. The fact that counsel for the second and third defendants had stated that he was not calling evidence to contravert the presumption that the note was given for good consideration did not deprive counsel of his right to put questions to the plaintiff as he might have been able to achieve that object under cross-examination.

In Halsbury's Laws (3rd Edn.) Vol. 15, the following passage appears at at p. 443, para. 800, viz.:

"Any party is entitled to cross-examine any other party who gives evidence or his witnesses; and no evidence affecting a party is admissible against that party unless the latter has had an opportunity of testing its truthfulness by cross-examination.

* * * *

A witness, once sworn, is liable to be cross-examined, even though he has not given evidence or been asked any question in chief, unless he has been called by mistake and not examined in consequence of the mistake being discovered."

At p. 444 of the same volume the following passage appears at para. 801, viz.:

"Cross-examination is directed to (1) the credibility of the witness; (2) the facts to which he has deposed in chief, including the cross-examiner's version thereof; and (3) the facts to which the witness has not deposed but to which the cross-examiner thinks he (witness) is able to depose."

The denial of the right of appellants' counsel to cross-examine the plaintiff on vital issues before the court, in my view, renders the trial unsatisfactory and I think the appeal by the appellants (second and third defendants) should be allowed and the judgment against them set aside and the proceedings so far as the appellants are concerned remitted to the Supreme Court for retrial. The appellants should have the costs of this appeal and also a refund of any costs paid by them in the first trial. Costs of the new trial together with costs of the former trial to be in the discretion of the trial judge.

Newbold JA: I agree.

Spry JA: I also agree.

Appeal allowed. Judgment set aside and case remitted to the Supreme Court for retrial.

For the appellants:

Patel & Thakkar, Mombasa

R. P. Cleasby and K. J. Thakkar

For the respondent:

Gautama & Gautama, Nairobi

S. C. Gautama

Mody's (E A) Ltd v P K Jani & another
[1964] 1 EA 610 (CAN)

Division: Court of Appeal at Nairobi

Date of judgment: 18 December 1964

Case Number: 49/1963
Before: Sir Daniel Crawshaw Ag VP, Sir Clement De Lestang and Spry JJA
Sourced by: LawAfrica
Appeal from: The Supreme Court of Kenya – Pelly Murphy, J.

[1] Landlord and tenant – Agreement to lease – Illegality – Illegal use of premises – Premises built for residential user – Premises let by landlords for business purposes – Alterations and repairs made to convert into business premises – Bye-law forbidding alterations without approval of plans by local authority – Bye-law prohibiting change of user without permission – No application made for change of user – Plans lodged for approval – Approval sought when alterations near completion – Plans approved – Premises vacated by tenant before expiry of term – Action for breach of agreement to lease – Whether agreement void for illegality.

Editor’s Summary

The respondents were owners of a double storey building at Nairobi, whereof its ground floor was erected for use for business premises and the first floor for residential purposes. By a verbal agreement made in September, 1955, the respondents agreed that the appellants should lease the first floor for a wholesale grocery. At the time of the agreement the respondents were carrying out certain work upon the premises so as to convert the first floor into business premises. The work was being done without the approval of the Nairobi city council and in contravention of certain building bye-laws. The appellants went into occupation on November 22, 1955, and after occupying the premises for about a year they refused to continue the tenancy and vacated the premises. The respondents sued for damages for breach of the oral agreement and the appellants in their defence pleaded that the agreement was void for illegality in that the change of user of the first floor was never authorised under the hand of the Town Clerk in writing as required under Bye-law 352 of the Nairobi Municipality (Building) Bye-Laws, 1948. It was common ground that the respondents had not specifically applied for a change of user but, in November, 1955, when the alterations and repairs were almost completed, the respondents, through their architect, submitted to the city engineer an application with a plan of the alterations to the building for which they sought approval of the city council. The application did not disclose that the alterations were almost completed. On January 6, 1956, the respondents were informed that their plan of proposed alterations to business premises was approved. The trial judge rejected the defence of illegality and on appeal it was contended that as the first floor was originally erected for residential purposes it could not be used lawfully for any other purpose without a change of user in accordance with Bye-law 352, that since it was contemplated by the parties when the agreement was made that the premises would be used for business purposes, it necessarily involved a contravention of the bye-law and was accordingly illegal; and that approval of a change of user only took effect in the future and did not legalise past unlawful user.

Held –

- (i) approval of a change of user takes effect in the future and not in the past;
- (ii) the parties neither intended nor contemplated illegal performance of the

agreement; there was nothing illegal in the agreement itself which was simply one of letting premises for the purposes of a grocer's business;

- (iii) the restriction on occupation of the premises were not absolute and the agreement could have been performed lawfully.

Appeal dismissed.

Cases referred to in judgment:

- (1) *Edler v. Auerbach*, [1949] 2 All E.R. 692.
- (2) *Charan Kaur & Others v. Mistry Makanji Vanmali* (1956), 23 E.A.C.A. 14.
- (3) *J. M. Allan (Merchandising) Ltd. v. Cloke & Another*, [1963] 2 All E.R. 258.
- (4) *Jackson Stansfield & Sons v. Butterworth*, [1948] 2 All E.R. 558.
- (5) *Best v. Glenville*, [1960] 3 All E.R. 478.
- (6) *Waugh v. Morris*, [1873] 8 Q.B.D. 202.
- (7) *Archbolds Ltd. v. S. Spanglett Ltd.*, [1961] 1 All E.R. 417.

The following judgements were read:

Judgment

Sir Clement De Lestang JA: The facts giving rise to this appeal are the following. The respondents were the owners of certain premises in Nairobi consisting of a double-storey building. The building was erected in 1903, its ground floor being approved for use for business purposes, and its first floor for residential purposes. The appellants were, to the knowledge of the respondents, wholesale grocers occupying premises nearby. By a verbal agreement made on September 20, 1955, the respondents agreed to grant and the appellants to take on lease the whole of the first floor of the premises for a term of four years and eight months commencing on November 1, 1955, subsequently altered to December 1, 1955, as the premises were not ready for occupation. At the time of the agreement the respondents were carrying out certain repairs and alterations to the premises so as to convert the first floor into business premises. The work was being carried out without the approval of the city council in contravention of the bye-laws, which will be referred to later. They further agreed to carry out certain works and supply certain fittings required by the appellants in order to put the premises into a condition that would enable them to obtain the necessary licence for carrying on the business of a wholesale grocer thereon.

In pursuance of the agreement the appellants went into occupation on November 22, 1955 (the tenancy to commence on December 1, 1955) and in the following month obtained a licence from the city council to carry on the business of grocers on the premises. After occupying the premises for approximately a year and paying rent therefor, the appellants refused to continue the tenancy and vacated the premises. Whereupon the respondents brought an action for damages for breach of the oral agreement aforementioned. By an amendment to their defence made in the course of the trial, the appellants pleaded that "the agreement sued upon is void for illegality in that the change of user of the first floor of the said premises was never authorised under the hand of the Town Clerk in writing from living user to business

user as required under Bye-law 352 (*a*)". The learned trial judge decided this issue against the appellants and the same point arises for decision in this appeal. It is convenient at this stage to set out the material portions of the relevant by-laws.

Bye-law 340 (1) of the Nairobi Municipality (Building) Bye-laws, 1948, provides that every person who proposes to erect a building . . . shall lodge with the municipal engineer an application for approval by the council of his proposals

and the plans relative thereto. Such application shall be on a form obtainable from the municipal engineer and shall contain written particulars relating to the following:

- (a) the purpose or purposes for which the building would be used;

* * * *

“Erection of a building” is defined in Bye-law 6 to include “the erection of any addition to an existing building” and “the changing of the purpose or purposes for which a building, part of a building . . . whether or not it is proposed to include any alterations or work in connection with the proposed change”.

Bye-law 342 requires that the municipal engineer shall be notified before any work approved by the city council commences. This bye-law also makes it clear that no work shall be executed until the plans therefor have been approved by the council.

Bye-law 347 empowers the Town Clerk to serve a notice on any person who commences work upon any building before the plans have been approved requiring him to cease work and failure to do so is an offence punishable by fine.

Bye-law 352 reads:

- “352. (a) Where any building has been erected a person shall not, except with the permission of the council under the hand of the Town Clerk and upon such terms as the council may prescribe, use or being the owner thereof allow such building to be used, otherwise than for the purpose or purposes specified or indicated in the approved plans and particulars and the application in respect thereof or for which the building was constructed.
- (b) ‘Purpose or purposes’ in this bye-law shall mean the particular purpose for which a building or part thereof has been erected or to which it has lawfully been altered and not solely its general purpose as a domestic building, a public building or a building of the warehouse class. . . .”

Bye-law 353 makes it an offence for any person to erect or make any alteration or addition to a building before making application to the council or before the council shall have signified their approval of the plans, etc.

Bye-law 375 prescribes general penalties for contravention of the bye-laws.

As I understand these bye-laws, a change of user may take place:

- (a) by a lawful alteration to the premises for the purpose of effecting such a change, and
- (b) by permission of the council under the hand of the Town Clerk.

At no time did the respondents in the present case specifically apply to the city council for a change of user, but on November 15, 1955, through their architect, they submitted to the city engineer an application together with a plan of the alterations to the building for which they sought approval of the council. The applications stated that the premises were “to be used as offices”, thus indicating that a change of user was proposed. It did not, however, disclose that at the time of the application the alterations were almost completed. On January 6, 1956, the respondents were informed by letter under the hand of the city engineer that their plan “of the proposed alterations to business premises was approved”. On the plan itself there appears the following rubber stamped impression, bearing the signature of the Town Clerk:

“City Council
of
Nairobi
This plan is
Approved
subject to compliance with the
Nairobi Municipality (Building) Bye-laws.
Town Clerk
6 DEC 1955”

As the first floor was originally erected for residential purposes and since it could not be used lawfully for any purpose without a change of user in accordance with Bye-law 352, so counsel for the appellants contends that since it was in the contemplation of the parties at the time the agreement was made that the premises would be used for the business of grocers, it necessarily involved a contravention of the bye-law and was accordingly illegal. He also contends that approval for a change of user only takes effect in the future and does not legalise past unlawful user and consequently that in the execution of the agreement the occupation of the premises for the purpose of a grocer's shop from December 1, 1955, until permission was obtained was unlawful. He further contends that the permission obtained was not valid because the work was completed before application was made and that fact was not disclosed therein.

It is, I think, clear from the wording of the bye-laws that approval must precede and not follow the execution of any work and I respectfully agree with counsel for the appellants that approval for a change of user takes effect in the future and not in the past. As regards the validity of the permission, counsel for the appellants referred to a passage in *Edler v. Auerbach* (1) where Devlin, J. (as he then was) said ([1949] 2 All E.R. at p. 697):

“Thirdly, the defendant says that on May 22 the council consented, in effect if not in form, to the plaintiff's professional use of the premises, and, accordingly, the lease can be enforced by the defendant after that date. I think that this plea fails. I doubt that the council's resolution legalises the professional use of the premises, but, assuming that it does, what has to be considered in the application of this principle is not whether the premises can legally be used for the purpose contemplated, but whether the defendant's conduct has been such as to disentitle him from obtaining the aid of the court to enforce the agreement to his own advantage. The agreement was part of the illegal scheme conceived by the defendant. It succeeded to this extent, as is clear from the minute of the meeting of the appropriate committee of the council of May 22, that, if the committee had not considered the plaintiff as being in actual occupation by reason of a bona fide error, they would not have given him any relief. To allow the defendant to take advantage of a consent obtained in those circumstances would give him a profit from his own wrong, but, in truth, neither success nor failure of the scheme matters. Neither would atone for the fact that it was conceived in wrongdoing. That is what matters and what debars the defendant from invoking the aid of the court.”

In my view the circumstances of the present case are very different from those of the case cited. It would seem that in that case but for the error the committee would not have given any relief. There is nothing in the present case to show that this was the case. Someone from the city engineer's office must have visited

the premises before approval was granted and must have seen that the work had practically been completed. I am not, therefore, convinced that the city council would have refused permission for that reason and I am not prepared, therefore, to accept that the approval in the present case was invalid for the reasons submitted.

In considering the issue of legality, it is necessary in my view to bear in mind that at the time of the agreement, although neither party realised that permission for a change of user was necessary, yet neither intended to break the law. Also the respondents did in fact obtain approval for certain works for the purpose of changing the user of the premises, the granting of which would have that effect. Such approval was obtained either on December 6, 1955, on the date the plan was approved as shown by the rubber stamp, or on January 6, 1956, when approval of the application was communicated to the respondents by the city engineer's letter of that date. In those circumstances counsel for the appellants contends that non obstat the absence of any intention on the part of the parties to break the law, what was contemplated by the parties by the agreement was an illegal user of the premises and, therefore, the agreement was illegal. He reinforces his contention by the argument that the agreement resulted in fact in an unlawful occupation and that neither the degree of illegality nor the shortness of the duration of the unlawful occupation affects the legal position. Persuasive as counsel for the appellants' submission is, I am unable to agree with it. This was an agreement which could be performed lawfully. It was not, therefore, *ex facie* illegal. It would only be illegal if violation of the law was contemplated or if it were the intention of the parties that it should be performed illegally. That was clearly not the case. The cases to which we were referred in support of counsel for the appellants' submission on this issue are, in my view, clearly distinguishable from the present one. In *Charan Kaur and Others v. Mistry Makanji Vanmali* (2), the letting of premises erected in contravention of the Nairobi Municipality (Building) Bye-Laws, 1948, was held unlawful *ab initio* and so unenforceable. It was so held because the landlord who was suing knew that the building had been erected unlawfully and the contract could not, therefore, be performed lawfully.

In *J. M. Allan (Merchandising) Ltd. v. Cloke & Another* (3), a contract of hiring of gambling implements was held illegal because the contract could not be performed without breaking the law, the implements being let for the purpose of a game which was unlawful. In that case again the contract could not be performed lawfully.

In *Jackson Stansfield & Sons v. Butterworth* (4) the prohibition against carrying out any work without a licence specifically declared the work to be "unlawful" and on its wording prevented a licence from having any retrospective effect. The builders were held debarred from recovering payment from it.

By contrast, in *Edler v. Auerbach* (1) where a landlord let for professional user premises which could not be so used except with permission, under the Defence (General) Regulations, 1939, it was held that the agreement was not *ex facie* illegal because it did not necessarily involve an infringement of the regulations. Devlin, J. (as he then was) said ([1949] 2 All E.R. 695E):

"It is well settled that an agreement may be unenforceable either because on the face of it it cannot be performed without breaking the law, or because, although capable of being performed legally, it was made with the object of breaking the law."

The agreement could be performed legally, for the regulation did not touch the letting of the premises but only the user. The reason the landlord could

not enforce the lease in that case was because he intended that the law should be broken by the lessee.

It seems to me that the present case is not fundamentally unlike *Best v. Glenville* (5), though distinguishable in some respects from it. That was a case where a landlord let a room to a tenant for the purposes of a bridge club, which was a development within the Town and Country Planning Act, 1947, without planning permission having been obtained. The parties, however, contemplated that planning permission should be obtained. It was held that the tenancy agreement was not illegal, that the refusal of planning permission did not affect its legality and that rent was accordingly recoverable. In that case an argument similar to that addressed to us by counsel for the appellants in the present case was not successful. It is true that stress was laid on the fact that it was the intention of the parties that planning permission should be obtained, but the real reason for the decision was that the agreement was entered into for a perfectly proper and legal purpose, and could be performed lawfully.

So also in *Waugh v. Morris* (6) where under a charter party for the transport of hay from France to England, it was the intention of the parties to land the hay in London, but such landing could not take place because unknown to the parties it was forbidden by the Contagious Diseases (Animals) Act, 1869, and the hay had consequently to be unloaded into another vessel and exported. It was held that as the contract was not made knowingly with the intention to violate the law and as it could be carried out without violating the law, it was not void.

In the instant case there was nothing illegal in the agreement itself which was simply one of letting of premises for the purpose of carrying on a grocer's business – a perfectly legitimate purpose. While I agree that if the agreement could not be performed without a violation of the law, it would be void irrespective of whether the parties knew the law or not, I am satisfied that the restriction on occupation in the present case, not being absolute, the agreement could be performed lawfully. There was indeed ample time between the date the agreement was made and the date possession was to be given for the necessary permission for a change of user to be obtained. That being so, only an intention to perform the agreement in an illegal manner would make it unlawful. In the present case the parties neither intended nor contemplated an illegal performance.

For these reasons I would dismiss this appeal with costs, and would certify for two counsel.

Sir Daniel Crawshaw Ag VP: I have read the judgment of de Lestang, J.A., with which I entirely agree. There will be an order in the terms proposed by him.

Spry JA: I have had the advantage of reading the judgment of de Lestang, J.A., with which respectfully I entirely agree.

There is only one comment that I would add. Part of counsel for the appellant's argument, if I understood him correctly, was that the object of the contract, as known to both contracting parties, was that the suit premises should be used by the appellant company for the purpose of a wholesale grocery business; that such user would have been unlawful without the prior consent, under Bye-law 352 of the Nairobi Municipality (Building) Bye-Laws, 1948, of the City Council: and that the respondents cannot have intended to obtain such consent since, according to the evidence of Mr. P. K. Jani, who conducted the negotiations, he was unaware of the requirements or even of the existence, of Bye-law 352. Consequently, although acting in all innocence, the parties, or

at least the respondents, were in fact contracting for an illegal purpose. He submitted that there are no degrees of illegality and that if illegality is once established, it matters not how trivial or technical it may be, it is enough to render the contract unenforceable.

It seems to me that that view is much too narrow. If a contract is not *ex facie* illegal, and if it is not one the performance of which necessarily involves the doing of some illegal act, it will only be unenforceable for illegality if the parties, or at least the party seeking to enforce it, had the intention, or the knowledge of the intention on the part of the other party, to perform the contract illegally and for this purpose, as Pearce, L.J., said in *Archbolds Ltd. v. S. Spanglett Ltd.* (7), “both parties are presumed to know the law”. There is no doubt that if the performance of the contract would necessarily be illegal, the contract is unenforceable, even though the parties were unaware of the prohibition. On the other hand, where some consent or authority is required, the fact that the parties are not aware of the necessity will not, in my view, taint the contract with illegality, if the parties will have the opportunity to discover the requirement and comply with it before the performance of the contract begins. There must be innumerable transactions where the parties at the time of contracting have some general understanding that some consent is required or that there is some formality to be undertaken and have every intention of doing what is proper and I cannot conceive that such transactions would be held to be tainted with illegality just because the parties were unaware of the precise requirement.

I also would dismiss this appeal with costs.

Appeal dismissed.

For the appellants:

J. K. Winaya & Co., Nairobi

Bryan O’Donovan, Q.C. and *J. K. Winayak*

For the respondents:

J. M. Nazareth, Q.C., *S. R. Kaplia* and *A. R. Kaplia*, Nairobi

John H R Thornhill v Islay Thornhill & another
[1964] 1 EA 616 (HCU)

Division:	High Court of Uganda at Kampala
Date of judgment:	24 July 1964
Case Number:	2/1964
Before:	Bennett J
Sourced by:	LawAfrica

[1] *Divorce – Domicil – Domicil of choice – Animus manendi – Petitioner employed in Uganda for three and a half years – Petitioner born elsewhere – Shares in company employing him his only assets in*

Uganda.

Editor's Summary

The petitioner in an undefended divorce suit had been born in the United Kingdom in 1918 but soon after his birth returned to Ceylon where his father was born and had lived all his life. The petitioner was also educated in the United Kingdom but when aged seventeen returned to and took employment as a tea planter in Ceylon. In 1961 he came to Uganda and was there employed by a company formed to manufacture and market instant tea. The petitioner had a substantial shareholding in this company but conceded that if the venture was unsuccessful he would find other employment in the tea industry which might involve taking a post in Kenya. Apart from his shareholding he had no assets in Uganda and had always held a British passport.

Held – there was insufficient evidence of a settled intention on the part of the petitioner to remain in Uganda permanently to enable the court to hold that he had acquired a domicile of choice there.

Petition dismissed.

Cases referred to in judgment:

- (1) *Bell v. Kennedy* (1868), L.R. 1 Sc. & Div. 307.
- (2) *Ramsay v. Liverpool Royal Infirmary*, [1930] A.C. 588.

Judgment

Bennett J: This is a husband's petition for dissolution of marriage on the ground of his wife's adultery. The petition is undefended. I have been asked by the petitioner's advocate to determine, as a preliminary issue, the matter of the petitioner's domicile, it being conceded that if the petitioner is not domiciled in Uganda this court would not have jurisdiction to make a decree having regard to s. 2 of the Divorce Ordinance.

The only witness to give evidence on the question of domicile was the petitioner himself. He testified that his father was born in Ceylon and had lived there all his life. He himself was born in the United Kingdom in 1918 while his father was serving in the British Army during the first World War. Shortly after his birth he returned to Ceylon with his parents. He received his education in the United Kingdom, but returned to Ceylon at the age of seventeen, where he took up employment as a tea planter. He continued to reside in Ceylon up till 1961, being employed in the management of a tea estate belonging to his family.

He has always held a British passport, and did not take Ceylon nationality after Ceylon became independent. In 1957, having found conditions in Ceylon no longer congenial, he decided to look for another country in which to live where he could pursue his occupation as a tea planter and consultant. With that object in view he came to Uganda in January, 1961. He found employment with a company named Solutea Ltd. which was formed with the object of manufacturing and marketing an instant tea. The Uganda Development Corporation holds a majority of the shares in this company, but the petitioner and his brother are joint owners of a substantial number of shares. The company has a factory at Port Bell where the petitioner has been engaged in experimental work on the production of instant tea. Although the petitioner first came to Uganda in January, 1961, he has only resided in Uganda for seventeen months during the last 3 1/2 years. When not in Uganda he has been residing either in Ceylon or in the United Kingdom.

While in Uganda he has been living at the Grand Hotel, Kampala, and has taken no steps to acquire a permanent place of residence in this country. He said that he would be more inclined to look for a house in Kampala when the manufacture of instant tea had proved a success. He said that in the event of the venture not being successful he would have no difficulty in finding other employment in the tea industry. He conceded that if he could not find suitable employment in Uganda he would have no objection to taking employment in the tea industry in Kenya. He liked Uganda because it was like Ceylon used to be, and wanted to make it his permanent home. He intended to purchase a house in Kampala if he succeeded in exporting his capital from Ceylon. He stated that if Uganda were to become like Ceylon is to-day he would not wish to stay here.

He has taken no steps to apply for Uganda nationality; nor, would it seem, has he any assets in this country apart from his shareholding in Solutea Ltd. The value of this would be difficult to assess since the shares are not marketable.

Although the petitioner was born in the United Kingdom, his domicile of origin appears to be Ceylon, that being the domicile of his father at the time of his birth. It is contended by his advocate that he has obtained a domicile of choice in Uganda, having made up his mind to reside here for an indefinite time and having decided to break with Ceylon.

I was favourably impressed by the frank way in which the petitioner gave evidence and I believe him to be a witness of truth. A person whose domicile is in question may himself give evidence of his intentions, but evidence of this nature is to be accepted with considerable reserve, even if the truthfulness of the witness be admitted: see Rayden on Divorce (8th Edn.) at p. 37; and *Bell v. Kennedy* (1), ((1868), L.R. 1 Sc. & Div. 307, at p. 313).

The onus is, of course, on the petitioner to prove a change of domicile. In *Ramsay v. Liverpool Royal Infirmary* (2) Lord Buckmaster said ([1930] A.C. at p. 590):

“The law upon the matter is settled. A domicile of origin can be changed and in its place a domicile of choice acquired, but the alteration is a serious matter not to be lightly assumed, for it results in a complete change of law in relation to two of the most important facts of life, marriage and devolution of property. This is admirably expressed by Lord Curriehill in *Donaldson v. M’Clure* in words unnecessary to repeat, which were expressly approved by Lord Halsbury in *Marchioness of Huntly v. Gaskell*. To acquire a new domicile it is essential, in the words of Lord Wensleydale in *Aikman v. Aikman*, to show that the person who is said to have changed his domicile ‘has abandoned his former domicile animo et facto’.”

The petitioner’s association with Uganda has been relatively short. It seems a fair inference from his evidence that Uganda’s chief attraction for him lies in its tea industry. Uganda is not the only country in East Africa with a tea industry. If Solutea Ltd. should not make a commercial success of processing instant tea, the petitioner would seek other employment in the tea industry. He would be as likely to find it in Kenya as in Uganda, and it is plain that he would have no objection to accepting employment in Kenya. His intention to remain in Uganda appears to be largely contingent upon the success of Solutea Ltd.’s commercial venture. His position is not altogether dissimilar to that of the appellant in *Bell v. Kennedy* (1) about whom Lord Cairns said ((1868), L.R. 1 Sc. & Div. at p. 316):

“He was there in the hope that, during the ‘twelve months’, he might be able to find some estate which might be suitable to him for purchase; but upon that contingency, as it seems to me, depended the ultimate choice which he would make of Scotland, or some other country, as a place of residence.”

In my judgment, there is insufficient evidence of a settled intention on the part of the petitioner to remain in this country permanently.

I find that the petitioner has not acquired a domicile of choice in Uganda, and that, consequently, he retains his domicile of origin.

The petition is dismissed.

Petition dismissed.

For the petitioner:

Wilkinson & Hunt, Kampala

R. E. Hunt

Giuseppina Canini v Sofia Binti Suleman and another
[1964] 1 EA 619 (CAM)

Division: Court of Appeal at Mombasa

Date of judgment: 7 July 1964
Case Number: 85/1963
Before: Sir Trevor Gould VP, Sir Daniel Crawshaw and Crabbe JJA
Sourced by: LawAfrica
Appeal from: The Supreme Court of Kenya – Pelly Murphy, J.

[1] Landlord and tenant – Lease – Forfeiture – Sublessees – Arrears of rent due by headlessee – Decree for possession against headlessee – Notice from headlessor to sublessees to deliver up possession – Application by sublessees for relief – Jurisdiction to grant relief – Whether headlessor “is proceeding by action or otherwise to enforce a forfeiture” under Indian Transfer of Property Act, 1882, s. 115 (3).

Editor’s Summary

The respondents and another since deceased, as headlessors, leased a piece of land to one S.M.M. as headlessee for one hundred and fifty years from October 1, 1953, for a premium of Shs. 15,000/- and a yearly rent of Shs. 4,500/-. The lease contained a covenant that if ‘any of the conditions covenants or stipulation’ were contravened, including the non-payment of rent “. . . then and in any of the said cases the lessors may put an end to this lease and it shall be lawful for the lessors at any time thereafter into and upon the said land or any part thereof in the name of the whole to re-enter and the same to have again re-possess and enjoy as in their former estate.” The headlessee subdivided the land into 27 plots and subleased a number of them for the full term of the headlease, one of such underlessees being the appellant. On April 27, 1961, the respondents as headlessors gave the headlessee notice in writing terminating the lease and claiming possession and in May, 1961, brought an action against him for possession of the land comprised in the headlease on the ground that there had been a breach of the covenant to pay rent, which, under the terms of the headlease, was a ground for forfeiture. On October 29, 1962, judgment was given in favour of the respondents and an order was embodied in the decree to the effect that the headlessee should deliver up possession to the respondents. The decree was registered in the Land Titles Registry on November 21, 1962, and on January 2, 1963, the advocates for the respondents wrote to the respective underlessees informing them that by virtue of the decree the respondents had become entitled to possession of the plots, and intimating that in default the respondents “will have no alternative but to take such steps as may be necessary to enforce the said decree”. On July 1, 1963, the appellant, an underlessee, brought an action against the respondents claiming relief against forfeiture so far as it applied to his plot. At the trial the only question for decision was whether the court had jurisdiction under s. 115 (3) of the Indian Transfer of Property Act, 1882, to grant relief from forfeiture to sublessees, and if so, upon what terms. The judge decided this against the sublessees. By s. 115 (3) *ibid.*:

“where a lessor is proceeding by action or otherwise to enforce a forfeiture . . . the court may, on application by any person claiming as underlessee any estate or interest in the property comprised in the lease or any part thereof, either in the lessor’s action (if any) or in any action brought by such person for that purpose, make an order vesting . . . the property . . . in any person entitled as underlessee to any estate or interest in such property. . . .”

The decision of the judge turned upon a slight difference between s. 115 (3) *ibid.* and s. 146 (4) of the Law of Property Act, 1925, of England, namely, that whereas the former refers to proceeding by action or otherwise “to enforce a forfeiture”, the latter uses the words “to enforce a right of re-entry or forfeiture. . . .” The submission on behalf of the respondents which the judge accepted and upon which he based his judgment was that, when the appellant, an underlessee, commenced his action, the respondents as headlessors were not “proceeding by action or otherwise to enforce a forfeiture” and that the forfeiture was complete when they obtained a decree for possession. It was common ground that the appellant, who was not a party to that action, did not commence proceedings until after the decree had been registered. The judge rejected the argument that the letter of January 2, 1963, requiring the appellant and the other underlessees to quit were threats to enforce the forfeiture and that forfeiture is not enforced until possession has been obtained by re-entry. On appeal similar arguments were advanced but a substantial part of the argument of counsel for the appellant turned upon s. 111 (g) of the Indian Transfer of Property Act, 1882, amended by the Indian Transfer of Property Act (Amendment) Ordinance, 1959.

Held –

- (i) the scheme of the amending Ordinance of 1959 was to state specifically the instances in which new sections or amendments were to apply only to future transactions and that where there was no specific provision or other determining factor the converse applied and existing transactions were affected;
- (ii) s. 111 (g) of the Indian Transfer of Property Act showed that there was a completed forfeiture, after the occurrence of one of the three events mentioned therein and when the lessor had given notice to the lessee of his intention to determine the lease;
- (iii) the word “condition” in s. 111 (g) *ibid.* was not limited to conditions proper but included “covenant”;
- (iv) in Kenya, under the Indian Transfer of Property Act, 1882, there must always be a completed forfeiture before action for possession is brought, and such an action does not, by the issue and service of the plaint, manifest an election; it is a condition precedent that the election should have been made by notice;
- (v) it was not the intention of the legislature that the underlessee must wait until court proceedings by way of execution are actually issued and directed personally at him; a proceeding to enforce a forfeiture must remain pending in relation to an underlessee as long as there is judgment for possession capable of being executed against him;
- (vi) enforcement of forfeiture against an underlessee of part of the leased premises, meant, in the context of the legislation, enforcement by obtaining physical possession against the underlessee;
- (vii) when the action of the appellant, an underlessee, was commenced there were still proceedings in being by the respondents as headlessors, to enforce the forfeiture and there was jurisdiction to entertain the appellant’s application.

Appeal allowed. Case remitted to the Supreme Court for determination of the terms on which relief should be granted.

Cases referred to in judgment:

- (1) *Krishna Prasad v. Adyanath* (1944), A.I.R. Pat. 77.
- (2) *Namdeo Lokman v. Narmadabai* (1950), A.I.R. Bom. 123.
- (3) *Eastern Radio Service v. R.J. Patel* (1962), E.A. 818 (C.A.).
- (4) *Moore v. Ullcoats Mining Co. Ltd.*, [1908] 1 Ch. 575.
- (5) *Warner v. Sampson*, [1954] 1 All E.R. 120.
- (6) *Serjeant v. Nash, Field & Co.*, [1903] 2 K. B. 304; [1903] All E.R. Rep. 525.

- (7) *Saheb Din v. Gauri Shankar* (1940), A.I.R. Oudh. 92.
- (8) *Tatya Saolya v. Yeshwanta Kondiba* (1951), A.I.R. Bom. 293.
- (9) *Talbot & Co. v. Haricharan Halwasiya* (1952), A.I.R. Col. 47.
- (10) *Croft v. Lumley*, [1858] 6 H.L. Cas. 672; 10 E.R. 1459.
- (11) *Rogers v. Rice*, [1892] 2 Ch. 170.
- (12) *Quilter v. Mapleson*, [1882] 9 Q.B.D. 672.
- (13) *Berton v. Alliance Economic Investment Co. Ltd.*, [1922] 1 K.B. 742.
- (14) *Lock v. Pearce*, [1893] 2 Ch. 271.
- (15) *Jones v. Carter* (1846), 15 M. & W. 718; 153 E.R. 1040.
- (16) *Egerton v. Jones*, [1939] 3 All E.R. 889.
- (17) *Sailendra Nath Bhattacharjee v. Bijanlal Chakravaty* (1945), A.I.R. Cal. 283.
- (18) *Ramkissendas v. Binjraj Chowdhury* (1923), 50 Cal. 419.
- (19) *Minet v. Johnson* (1890), 63 L.T. 507.
- (20) *Humphreys v. Morten*, [1905] 1 Ch. 739.
- (21) *Howard v. Fanshawe*, [1895] 2 Ch. 581; [1895] All E.R. Rep. 855.

The following judgments were read:

Judgment

Sir Trevor Gould VP: This is an appeal (consolidated by consent) from the judgments of the Supreme Court of Kenya at Mombasa in Civil Cases Nos. 11 and 141 of 1963. There was in fact only one judgment, which was given in Civil Case No. 141 of 1963, but, as that was a test case, the same judgment was recorded by consent as the judgment in Civil Case No. 11 of 1963 also.

The facts before the Supreme Court were not in dispute. The defendants in the actions (together with another trustee since deceased) leased a piece of land on November 14, 1953, to one Sheikh Mafood Mackawi (hereinafter called “the headlessee”) for a term of one hundred and fifty years from October 1, 1953, for a premium of Shs. 15,000/- and a yearly rent of Shs. 4,500/-. The lease contained a covenant in the following terms:

- “(m) If at any time during the currency of this lease the lessee shall contravene any of the conditions covenants or stipulations herein written or shall become insolvent or if the rent hereby reserved or any part thereof shall be in arrear for the space of three months next after any of the days when the same ought to be paid as aforesaid whether the same shall or shall not have been legally demanded then and in any of the said cases the lessors may put an end to this lease and it shall be lawful for the lessors at any time thereafter into and upon the said land or any part thereof in the name of the whole to re-enter and the same to have again re-possess and enjoy as in their former estate.”

The headlessee subdivided the land comprised in his lease into twenty-seven plots of approximately one half of an acre each and subleased a number of the plots to various persons for the full term of the

headlease. At the time when the subleases were executed the headlease contained no prohibition against assignment or subletting. Among the plots so subleased was Plot No. 1161 of which the plaintiff in Civil Case No. 141 of 1963 became the underlessee, and Plot 1179, of which the plaintiff in Civil Case No. 11 of 1963 became the underlessee: these subleases were dated respectively September 28, 1956, and October 25, 1956. The premium paid to the headlessee in the former case was Shs. 15,000/- and in the latter, Shs. 20,000/-; in each case the rent reserved was Shs. 200/- per annum. As I have mentioned, these subleases were for the full term of the headlease but it was conceded by counsel in the Supreme Court (and so held by the learned judge) that for the purposes of the suit the plaintiffs were underlessees. On appeal there has been no challenge to that finding.

In May, 1961, the headlessors brought Civil Case No. 194 of 1961 against the headlessee claiming possession of the land comprised in the headlease on the ground that there had been a breach of the covenant to pay rent, which, under the terms of the headlease, was a ground for forfeiture. On April 6, 1961, i.e. about a month before suit, the headlessors had given the headlessee notice in writing terminating the lease and claiming possession. On October 29, 1962, judgment in that action was given in favour of the headlessors and there was an order embodied in the decree in the following terms:

- “(1) The defendant to deliver up to the plaintiffs possession of the suit premises, namely, sub-division No. 1126 (Original No. 310/3) of Section VI, Mombasa Mainland North.”

There were also orders for payment of arrears of rent and for payment of mesne profits from April 7, 1961. The title to the land in question being registered under the Registration of Titles Ordinance (Cap. 281 Laws of Kenya) the decree referred to was registered in the Land Titles Registry on November 21, 1962. On January 2, 1963, the advocates for the headlessors wrote to the respective underlessees stating that by virtue of the decree the headlessors had become entitled to possession of the respective plots and requiring them to quit and deliver up possession, and intimating that in default the headlessors “will have no alternative but to take such steps as may be necessary to enforce the said decree”. In his judgment the learned trial judge said that the letter of January 2, 1963, was “the first notice” given to the underlessees of the proceedings against the headlessee. Counsel for the headlessors has in this court pointed out that this does not mean that the underlessees necessarily had no knowledge of those proceedings, and in Civil Case No. 11 of 1963 there is correspondence to show that the mortgagee at least, of the underlessee, was aware of them. The possible lack of knowledge of the underlessees has not been urged in argument on this appeal as being a material factor.

The court was informed that the plaint in Civil Case No. 11 of 1963 was issued on April 1, 1963 – the date does not appear from the record. In Civil Case No. 141 of 1963 the date was July 1, 1963. In these actions the two underlessees respectively as plaintiffs claimed to be relieved of the forfeiture of the headlease so far as it applied to their plots. In his judgment the learned judge said that it was agreed that the only question for decision is whether the court had jurisdiction under s. 115 (3) of the Indian Transfer of Property Act, 1882, to grant the underlessees relief from forfeiture, and if so, upon what terms such relief should be granted. He decided the question of jurisdiction adversely to the underlessees and it is from that decision that this appeal is now brought, the appellants being the underlessees and the respondents the headlessors.

The decision of the learned judge turned upon a slight difference between s. 115 (3) of the Indian Transfer of Property Act, 1882 (which, it is common ground, contains the relevant law as to relief of an underlessee) and s. 146 (4) of the Law of Property Act, 1925, of England. Section 115 (3) reads:

“Where a lessor is proceeding by action or otherwise to enforce a forfeiture under any covenant or condition in a lease, or for non-payment of rent, the court may, on application by any person claiming as underlessee any estate or interest in the property comprised in the lease or any part thereof, either in the lessor’s action (if any) or in any action brought by such person for that purpose, make an order vesting, for the whole term of the lease or any less term, the property comprised in the lease or any part thereof in any person entitled as underlessee to any estate or interest in such property upon such conditions as to execution and registration of any

deed or other document, payment of rent, costs, expenses, damages, compensation, giving security, or otherwise, as the court in the circumstances of each case may think fit, but in no case shall any such underlessee be entitled to require a lease to be granted to him for any longer term than he had under his original sublease:

Provided that nothing in this subsection shall apply to a forfeiture arising on a breach, to which the underlessee is a party, of an express covenant of condition against the underletting, parting with the possession or disposing of the property leased."

The material distinction (and the only one of substance) between this subsection and s. 146 (4) of the Law of Property Act, 1925, is that whereas the former speaks of proceeding by action or otherwise "to enforce a forfeiture", the latter uses the words "to enforce a right of re-entry or forfeiture . . .". The submission on behalf of the headlessors which the learned judge accepted and upon which he based his judgment was that, when the underlessees commenced their actions, the headlessors were not "proceeding by action or otherwise to enforce a forfeiture". The forfeiture was complete when the headlessors obtained their decree for possession. The underlessees, who were not parties to that action, did not commence their own proceedings until after the decree had been made and registered. The argument for the underlessees, that the letters of January 2, 1963, requiring the underlessees to quit were threats to enforce the forfeiture and that forfeiture is not enforced until possession has been obtained by re-entry, was rejected.

The argument on appeal to this court covered the same or similar ground, but before I proceed to its consideration there are some necessary preliminary observations. A substantial part of the argument of counsel for the underlessees turned upon s. 111 (g) of the Transfer of Property Act which, for convenience I now set out:

"111. A lease of immovable property determines –

- (g) by forfeiture; that is to say, (1) in case the lessee breaks an express condition which provides that on breach thereof, the lessor may re-enter or the lease shall become void; or (2) in case the lessee renounces his character as such by setting up a title in a third person or by claiming title in himself; or (3) the lessee is adjudicated or becomes an insolvent and the lease provides that the lessor may re-enter on the happening of such event; and in any of these cases the lessor or his transferee gives notice in writing to the lessee of his intention to determine the lease;"

Counsel did not call the court's attention to the fact that until the coming into operation of the Indian Transfer of Property Act (Amendment) Ordinance, 1959, on May 5 of that year the alternative (3) did not appear in the subsection and in lieu of the words following the penultimate semicolon, it read:

"and in either case the lessor or his transferee does some act showing his intention to determine the lease:"

That was the law at the time the headlease and the underleases were executed though it was altered before the action for possession was brought against the headlessee. The change made in Kenya in 1959 had been made in India in 1929 and there is a note in Mulla's Transfer of Property Act (4th Edn.) at p. 683 that the amendments of 1929 were not retrospective. The two authorities cited for the statement are *Krishna Prasad v. Adyanath* (1) and *Namdeo Lokman v. Narmadabai Keshoodeo* (2); they bear out what is stated

in the note but it is indicated in the judgments that the effect of the 1929 amendment in India was by the amending Act specifically restricted to transfers of property made after April 1, 1930.

Examination of the Indian Transfer of Property Act (Amendment) Ordinance, 1959, discloses no such provision generally or in relation to the amendment of s. 111. There are, however, certain relevant provisions in other sections of the amending Ordinance. Section 9 enacts new ss. 65A and 65B (relating to powers of mortgagees) and these sections are confined to mortgages made after the commencement of the amending Ordinance, though by agreement they may be applied to prior transactions. A new s. 69 enacted by s. 13, creates a statutory power of sale in certain mortgages; it is confined to mortgages made after the amending Ordinance. A new s. 69F relating to the appointment of receivers, is similarly limited. The same amending Ordinance (by s. 21) enacted for the first time s. 115 (3), which is set out above, and it has not been suggested that it would not be available to the underlessees if they bring themselves within its terms.

It would seem that the scheme of the amending Ordinance of 1959 was to state specifically the instances in which new sections or amendments were to apply only to future transactions and that it can be assumed that where there is no specific provision or other determining factor the converse applies and existing transactions are affected. (I am not, of course, referring to cases, such as *Eastern Radio Service v. R. J. Patel* (3) in which legal proceedings were pending when the amending Ordinance came into force). No argument has been addressed to the court on this question and I therefore assume that counsel have taken the view indicated by me, and will proceed on the basis that the law as amended or enacted by the amending Ordinance, is applicable.

There is one further preliminary observation. In the Supreme Court counsel for the underlessees sought and obtained leave to amend his pleadings so as to enable him to reply upon the general jurisdiction to grant relief in equity as well as that created by statute. Later, however, he abandoned that plea and rested his case solely upon the statute. This court therefore has only been called upon to consider the question upon the basis of s. 115 (3) of the Transfer of Property Act.

The argument of counsel for the sublessees in this court was that the words “a right of re-entry or” in s. 146 (4) of the Law of Property Act, 1925, were deliberately omitted (as the learned judge held) from the Kenya legislation. The reason for the omission (as to which the learned judge expressed no opinion) was that there were basic differences between the law of England and that of Kenya in relation to forfeiture of leases. In England, counsel submitted, a lease was liable to forfeiture for (a) breach of a condition or (b) breach of a covenant provided the lease contained a proviso for re-entry upon such breach. Where a forfeiture was incurred a lessor might determine the lease by peaceable re-entry or ejectment suit. Mere notice of intention to re-enter is not sufficient of itself. In Kenya the position was different. Section 111 (g) of the Transfer of Property Act shows that there is a completed forfeiture, after the occurrence of one of the three events mentioned in the subsection and when the lessor has given notice to the lessee of his intention to determine the lease. The date of forfeiture was the date of the notice – in the present case April 6, 1961.

Counsel’s argument continued that there was a second difference in the law in that in England a right to forfeit could arise for breach of a condition even if there was no proviso for re-entry. In Kenya there must be such a proviso (except in a case under the second paragraph of s. 111 (g)). The word “condition” in that subsection was not limited to conditions proper but included “covenant”. Therefore in Kenya it was unnecessary to provide for re-entry in s. 115 (3) as

it was included in the concept of enforcement of forfeiture. He criticised the concluding passage in the judgment in the Supreme Court, which reads:

“It seems to me that in Kenya relief is available to underlessees only while the legal estate of the head lessee is in being and that here, that estate having been terminated by enforcement of forfeiture, the court has no jurisdiction to grant the relief claimed by the plaintiff.”

The legal estate, counsel submitted, was terminated by forfeiture by the notice prior to the suit and not by the suit or the judgment thereon. The suit in ejectment was an act in enforcement of the forfeiture. The forfeiture was not enforced in this sense until possession was actually obtained by legal proceedings or peaceable re-entry.

I think it will be of advantage at this stage to narrow the issues by expressing my views on certain aspects of this argument. I accept that in s. 111 (g) the word “condition” is used in a sense wide enough to embrace covenants. That is stated in Mulla’s Transfer of Property Act (4th Edn.), p. 684, and is consistent with the requirement in paras. (1) and (3) that there must be a proviso for re-entry. This interpretation has not been contested in argument and I do not deem it necessary to go into the authorities.

I also agree that the existing wording of s. 111 (g) imports a departure from English law. Counsel, I think, put the matter too narrowly when he submitted that under English law a forfeiture could only be claimed by peaceable re-entry or suit for possession. Those are the two most common manifestations of an election to forfeit but I do not think they necessarily exclude others, if final and positive. The following passage from the judgment of Warrington, J., in *Moore v. Ullcoats Mining Co. Ltd.* (4) ([1908] 1 Ch. at pp. 587-588), was approved in the judgment of Hodson, L.J., in *Warner v. Sampson* (5) ([1959] 1 All E.R. at pp. 128-129):

“I am of opinion upon the authorities – and I refer particularly to *Jones v. Carter*, 15 M. & W. 718, 725 and to a dictum of Bayley, J.’s in *Fenn v. Smart*, 12 East, 444, 448 – that where the condition in the lease is that the landlord may re-enter he must actually re-enter, or he must do that which is in law equivalent to re-entry, namely, commence an action for the purpose of obtaining possession. Parke, B., in *Jones v. Carter* puts that quite plainly. In the particular case to which he was referring the proviso for re-entry was in a different form to that in the present case – a form which one sometimes finds, namely, that upon breach the lease shall be determined. What he says is this: ‘An entry, or ejectment, in which an entry is admitted,’ – that is, having reference to the old form of procedure – ‘would be necessary in the case of a freehold lease, or of a chattel interest, where the terms of the lease provided that it should be avoided by re-entry. Whether any other act unequivocally indicating the intention of the lessor would be sufficient to determine this lease’ – that is, the lease in the form of the one with which he was dealing – ‘which is made void at the option of the lessor, we need not determine, because an ejectment was brought, and proceeded with to the consent-rule, by which the defendant admitted an entry, and the entry would certainly be an exercise of the option.’ In *Fenn v. Smart* Bayley, J. – although it is only a dictum in the course of the argument, but it shews the view he took – said: ‘Must not the necessity of an entry depend upon the wording of the condition? If the words be, that upon the doing of such an act, the reversioner may enter, there must be an entry to avoid the estate; but if the estate be granted upon condition that if the grantee do such an act, the estate shall thereupon immediately cease and determine, there no entry is necessary.’ He there draws a distinction between the two classes of cases. In my opinion the present case

falls within the first class, and I do not see how it is possible, on any construction of this proviso for re-entry, to say that the lessors have re-entered, when all that they have done is to give a notice of their intention to re-enter, founded on a statement that the lease had determined, which had not in fact happened, or a demand for possession founded on that notice.”

It would appear to be implied there that if a lease provided for forfeiture upon breach and upon a notice electing to forfeit being given in certain terms, such a notice might suffice. Be that as it may, s. 111 (g) effects a departure from English law by providing that, after the happening of one of the three events specified in the subsection, a notice of intention to determine the lease is essential, and on a plain reading of the subsection it completes the forfeiture and the lease thereby determines. The basis of the forfeiture would no doubt be subject to challenge in an action for possession or other form of action, just as would, in English law, an election to forfeit by the issue of a writ or by peaceable re-entry. What was said by the Master of the Rolls in *Serjeant v. Nash, Field & Co.* (6), would remain relevant ([1903] 2 K.B. at pp. 311-312):

“It is true that the rights of the parties were not determined by the issue of the writ, and could not be finally determined until the result of the action was known; but that consideration does not affect the fact of the election of the lessor to treat the lease as at an end, subject to proof that there had been a breach of covenant which entitled her to do so.”

The difference between the English law and that under the Transfer of Property Act is emphasised by the fact that until 1929 in India and until 1959 in Kenya s. 111 (g) required, not that the lessor should give notice of his intention to determine the lease but that the lessor should do “some act showing his intention to determine the lease”, which is much more expressive of the English law: peaceable re-entry or suit for possession would comply with that requirement. In *Saheb Din v. Gauri Shankar* (7), it was held that failure to give the notice required by s. 111(g) (under the post-1929 law) was fatal to an action for ejectment. In *Tatya Salya v. Yeshwant Kondiba* (8), ((1951) A.I.R. Bom., at pp. 284-285), the effect of the amendment is stated:

“This contention of Mr. K.V. Joshi however does not give due effect to the amendment which has been incorporated in s. 111 (g), T.P. Act from and after 1929. The law before this amendment was that even in the case of disclaimer of the lessor’s title by the lessee what the lessor had to do was some act showing his intention to determine the lease, and it had been held under that provision of the law that the filing of a suit in ejectment against such lessee was an act showing the lessor’s intention to determine the lease. This position was, however, changed by the amendment in 1929 and as a result of the amendment it became incumbent on the lessor to give notice in writing to the lessee of his intention to determine the lease before a suit could be filed by him against the lessee for eviction.”

I take the following passage from the judgment in *Talbot & Co. v. Haricharan Halwasiya* (9) ((1952) A.I.R. Cal. 47 at p. 51):

“Forfeiture of a lease requires the operation of two factors, one is a breach by the lessee of an express condition of the lease which provides for re-entry on such breach and the other is a notice by the lessor expressing his intention to determine the lease. These are the two basic requirements of forfeiture. The moment a breach of such an express condition providing for re-entry is committed by the lessee the lease becomes voidable by the lessor but the forfeiture is not complete unless and until the lessor elects to avail of the breach by giving notice of his intention to determine the lease.”

In the same case it was held that the date of the forfeiture was the date of the notice of forfeiture. That notice under s. 111 (g) is a condition precedent also to peaceable re-entry follows in principle and is to be gathered from the judgments in *Saheb Din v. Gauri Shankar* (7) and *Namdeo Lokman v. Narmadabai Keshooodeo* (2).

I accept then, that in Kenya, under the Transfer of Property Act, there must always be a completed forfeiture before action for possession is brought, and that such an action does not, by the issue and service of the plaint, manifest an election; it is a condition precedent that the election should have been made by notice.

Support for this view appears in a commentary in Mulla's Transfer of Property Act (4th Edn.) at p. 692, on s. 112 of the Act. That section reads:

"112. A forfeiture under s. 111, clause (g) is waived by acceptance of rent which has become due since the forfeiture, or by distress for such rent, or by any other act on the part of the lessor showing an intention to treat the lease as subsisting:

Provided that the lessor is aware that the forfeiture has been incurred:

Provided also that, where rent is accepted after the institution of a suit to eject the lessee on the ground of forfeiture, such acceptance is not a waiver."

The commentary above-mentioned refers to the case of *Croft v. Lumley* (10), in which Bramwell, B., having stated that the expression "waiving a forfeiture" though sufficiently correct for most purposes is not strictly accurate, said (1858 10 E.R. at p. 1472):

"In strictness, therefore, the question in such cases is, has the lessor, having notice of the breach, elected not to avoid the lease? Or has he elected to avoid it? Or has he made no election?"

The commentary reads:

"In case (1) he must as required by s. 111 (g) give notice in writing to the lessee of his intention to determine the lease, and it is only then that there is a forfeiture and the lease is terminated. Thus under s. 111 (g) two things, namely the happening of any of the three specified events and the giving of the notice by the lessor together amount to a forfeiture. Under that section there can be no forfeiture unless and until the lessor gives the notice. Therefore there can be no forfeiture as contemplated by that section without the lessor being aware that the event which gives him the right to put an end to the lease has happened, for, without such knowledge, he cannot give the notice and without such notice there is no forfeiture as defined in that section. In this view of the matter the language of s. 112 does not appear to be very happy. If 'A forfeiture under s. 111, cl. (g)' means the happening of any of the three specified events followed by a notice from the lessor, the first proviso to s. 112 becomes meaningless for there cannot be a forfeiture under s. 111 (g) without the knowledge of the lessor. This proviso, therefore, makes it clear that the word 'forfeiture' as used in s. 112 does not mean the same thing as 'forfeiture' as defined under s. 111 (g)."

The commentary then proceeds to state that it would be more accurate to say that there is a waiver of the breach, the disclaimer, or the insolvency, as the case may be – rather than a waiver of forfeiture. I quote this passage only because the view of s. 111 (g) expressed in it is consistent with my opinion as set out above.

The question remains what effect, if any, this difference in law should have in relation to s. 115 (3) of the Act, and, as a necessary preliminary to that matter, I will set out the argument of counsel for the headlessors. He contended that any difference in law under s. 111 was not significant; that the question was whether under s. 115 (3) there was jurisdiction to grant relief. Under that section an underlessee could only apply for relief (by his own or in the headlessor's action) during the currency of the headlessor's action; the currency of the action terminated once judgment was given. He submitted that a lessor was seeking to enforce a forfeiture when seeking to establish his right to it; that no action had been taken by the headlessors on their decree for possession and that no one could point to any proceedings being taken by them; that if they proceeded against the underlessees now by action that would be an action in trespass and not to enforce a forfeiture; that the headlessors could not be said to be proceeding "otherwise than by action" as they had brought an action and that the underlessees had to show that Civil Case No. 194 of 1961 was a proceeding action when their own complaints were filed; that there was a clear distinction between the physical act of enforcing a re-entry and enforcing a forfeiture which meant putting an end to the legal estate. Concerning the threat in the letters of January 2, 1963, to enforce the decree, the decree could not be enforced against the underlessees as the judgment did not decide that the underlessees were such or were privies of the headlessee.

A number of English authorities were cited. In *Rogers v. Rice* (11), it was held that a lessee could not apply under s. 14 (2) of the Conveyancing and Law of Property Act, 1881, for relief against re-entry or forfeiture after the lessor had actually re-entered. (Section 14 (2) is now s. 146 (2) of the Law of Property Act, 1925). Lord Coleridge, C.J., said ([1892] 2 Ch. at pp. 171-172):

"Here proper notice was given, under s. 14 (1), before the lessor commenced his action. The lessee did nothing to comply with the notice. The action proceeded to judgment, the judgment was executed, so far as possession was concerned, and at the time when the present proceeding was commenced the lessor was in possession. The action then, so far as related to enforcing the right of re-entry, was at an end, and it cannot be said that the landlord was 'proceeding' to enforce his right of re-entry."

That was not a case of an underlessee, who might well know nothing of any notice given prior to action. As the relevant section included a "right of re-entry or forfeiture" the court could rely on the right of re-entry when deciding when the proceeding terminated without the necessity of deciding when it would have terminated if the words had been limited to a right of forfeiture. The court followed what was said to the same effect in *Quilter v. Mapleson* (12), but counsel for the underlessees relied upon the following passage from the judgment of Lindley, L.J., ([1882] 9 Q.B.D. at p. 676):

"I also am of opinion that s. 14 (2) of the Act of 1881 is applicable. The action was brought by the landlord on the ground of breaches committed before the Act, and he obtained judgment before the Act came into operation, but execution was stayed, so that he has never obtained possession. The original action then is not yet at an end. Now when we look at s. 14, we find that so far as language goes, sub-s. (2) applies to the case. So long as the tenant has not been turned out of possession he is within the terms of the enactment for the lessor is 'proceeding to enforce' his right of re-entry."

Counsel relied upon the statement that the original action is not at an end (until possession is obtained) as showing that the headlessors' action in the present case is still proceeding. Lindley, L.J., was, of course, speaking of

possession against the lessee (there was no sublessee) and his words, though they may have some application to a sublessee who could be evicted under the judgment for possession, were not specifically directed to that situation. As in *Rogers v. Rice* (11) the emphasis was on the right of re-entry and not of forfeiture.

Serjeant v. Nash Field & Co. (6) was relied upon by the learned judge. It is authority for the proposition that the issue and service of a writ for possession operates as a final election by the lessor to determine a lease. That is settled English law but I have pointed out that under the Transfer of Property Act, the final election must be made prior to action or peaceable re-entry.

The learned judge also referred to *Berton v. Alliance Economic Investment Co. Ltd.* (13) as demonstrating the clear distinction between an action for forfeiture and one for physical possession. In that case a sublessor got judgment for possession against his sublessee but without joining or taking steps to eject weekly tenants who were in occupation. Counsel relied upon the case as showing that forfeiture was complete, though no steps to re-enter were taken; the inference was that in the instant case forfeiture was complete when judgment for possession was obtained and all thereafter was enforcement of a right of re-entry which was not covered by s. 115 (3) of the Law of Property Act. I accept that as the English law but the effect of the Kenya legislation has yet to be studied.

Lock v. Pearce (14) was similarly relied upon by counsel as showing that a forfeiture was completed by judgment for possession in the County Court. An application for relief by originating summons in the High Court was held to be wrong procedurally; an action in the High Court commenced (as was the originating summons) before actual ejectment of the tenants in occupation, would presumably have been in order. I do not think anything additional is to be gleaned from this authority.

I accept that under the English law an underlessee must take action before physical re-entry, or he is too late. That follows naturally upon the inclusion in s. 146 (4) of the Law of Property Act, 1925, of the words “a right of re-entry” and it has never been necessary to make any distinction or consider what would have been the effect of the section without those words. In Kenya, it is necessary to consider what meaning the legislation intended the words “enforce a forfeiture” in s. 115 (3) of the Transfer of Property Act to bear, read in the context of the other sections of the Act.

I think it will be useful first to compare the exact wording of the section last mentioned with s. 146 (4) of the Law of Property Act. The former reads “enforce a forfeiture” and the latter “enforce a right of re-entry or forfeiture”. In my opinion the natural meaning of the words in the English Act is “enforce a right of re-entry or a right of forfeiture” as otherwise it could be expected that the wording would be “enforce a right of re-entry or a forfeiture”. That is consistent also with the position in England that where a writ for possession is issued that is to be taken as being a final election to determine the lease. By the writ the lessor enforces his right to forfeit and does forfeit (subject to proof) the lease. Similarly, when the lessor re-enters peaceably he is enforcing his right to forfeit and does forfeit the lease; I do not think the fact that he does so by exercising the ancillary right to re-enter, changes that position. The writ or re-entry is the manifestation of the exercising of the option to forfeit (*Jones v. Carter* (15)), and, in my view, the means of enforcement of the right.

In the Transfer of Property Act the words are “enforce a forfeiture” by action or otherwise – not a right to a forfeiture. That wording is consistent with the effect of s. 111 (g) whereby the right to a forfeiture must be exercised by notice, and a completed forfeiture is a condition precedent to either action

for possession or peaceable re-entry. If, then, the forfeiture is complete prior to action what is meant by enforcing it? I do not think that it can mean anything but the taking of such steps as may be lawful “by action or otherwise” to gain possession of the premises in question; in a word, re-entry. It can hardly be gainsaid that peaceable re-entry would be enforcing the forfeiture in this sense. As to an action for possession, it is no longer an action for forfeiture in the sense that the issue and service of the plaint are not an integral or essential part of the forfeiture or the right to it. The action is purely an action for possession and could, as I see it, be founded solely in trespass. It is clear, of course, and the argument can be used against the construction I suggest, that in such an action the validity of the forfeiture could be put in issue by the lessee; if the latter pleaded his lease the lessor would need to reply that he had forfeited it. In the end that would have the same practical result as a forfeiture action under English law, as to which in *Serjeant v. Nash Field & Co.* (6) it was pointed out that, though the issue of the writ was a conclusive election to forfeit, it was still subject to proof of the breach relied upon. I do not think, however, that this consideration does anything to change the nature of the action in Kenya, which is necessarily based on a completed election and forfeiture prior to action. I do not think that in those circumstances an action to “enforce” the forfeiture can be other than an action to assert the right acquired thereunder, i.e. the right to possession. The significance of the distinction relates to the argument of counsel for the headlessors (basing himself on the English authorities) that the headlessors were no longer proceeding to enforce a forfeiture after they obtained judgment for possession. On the English legislation and authorities that would, I think, be correct, in that the action is brought to enforce the right to forfeiture. In Kenya, as I have indicated, I think the action is brought to enforce the forfeiture by enforcing its legal consequences and that result is not attained merely by the judgment but only when the judgment itself is enforced. I have already referred to the passage from the judgment of Lindley, L.J., in *Quilter v. Mapleson* (12) which, though based on different legislation is relevant if my view is accepted that in Kenya under the Transfer of Property Act the enforcement of a forfeiture means the enforcement of its legal consequences.

If I am wrong in my construction of the Transfer of Property Act it would appear that an underlessee has very little protection in Kenya. In passing, I would observe that in a case where a landlord manages to obtain peaceable re-entry, the underlessee appears to have no remedy in relief under either the English or the Kenya Acts, although he may have had no notice that a right of forfeiture was being asserted. After re-entry he is too late. This position was relied on in argument in *Rogers v. Rice* (11) ([1892] 2 Ch. at p. 171) as indicating that the word “proceeding” should be construed in a wide sense, but the argument was not dealt with in the judgments. It may be that under other legislation or general jurisdiction in equity the courts could deal with such a situation but I am not called upon to go into that question. In a proceeding by way of action in English the sublessee cannot be taken by surprise for, by virtue of Order 47 of the Rules of the Supreme Court a writ of possession will not issue unless it is proved that all persons in actual possession have received sufficient notice to enable them to apply for relief. In Kenya, on the argument accepted by the Supreme Court, an underlessee could be deprived of all right to apply for relief by a default judgment for possession of which he knew nothing. A similar hypothetical situation was apparently regarded by the court in *Egerton v. Jones* (16) with equanimity, but that is no reason to seek to construe legislation so as to attain such a result.

I have next to consider the argument of counsel for the headlessors that, even if the proceedings in an action against a lessee for possession do not terminate with the decree for possession, they did so in the present case because the

decree could not be executed against the underlessees. I find the argument unacceptable. Order XXI, r. 30 (1) of the Kenya Civil Procedure (Revised) Rules, 1948, is in exactly the same terms as Order 21, r. 34 (1) of the Indian Code of Civil Procedure, and reads:

“Where a decree is for the delivery of any immovable property, possession thereof shall be delivered to the party to whom it has been adjudged, or to such person as he may appoint to receive delivery on his behalf, and, if necessary, by removing any person bound by the decree who refuses to vacate the property.”

In the Code of Civil Procedure By Mulla (12th Edn.), Vol. 2, pp. 807-808, and in the Code of Civil Procedure By Chitaley and Rao (5th Edn.), Vol. 2, p. 2310, are statements that a sublessee is bound by the decree against the lessee and the decree in ejectment can be executed against the sublessee even though he was not a party to the action. The authorities are *Sailendra Nath Bhattacharjee v. Bijan Lal Chakravarty* (17) ((1945) A.I.R. Cal. at p. 290, et seq.) and *Ramkissendas v. Binjraj Chowdhury* (18); they amply support the statements in the reference books. In England the same position is indicated by the case of *Minet v. Johnson* (19) in which a lessor served only his lessee with a writ for possession and judgment went by default. Under a writ of possession the sheriff put out of possession persons actually on the premises. The Master of the Rolls said ((1890) 63 L.T.N.S. at pp. 507-508):

“If Hartley were a tenant of Johnson’s course he must go out; therefore to support his complaint now he must say that he had some independent right of his own.”

I think this argument is without merit.

The next submission is that there is no proceeding in being because the headlessors did not in fact take out execution and that if they did proceed further it might be by way of action in trespass for possession. If I may deal with the second point first I do not think it is material on my construction of the Act. If I am correct in thinking that “proceeding to enforce a forfeiture” in s. 115 (3) means proceeding to enforce the rights legally consequent upon a forfeiture, those rights include the right to regain possession against a lessee and those claiming through him. The form of the proceeding does not appear to me to be material. I do not think that in England an attempt to evade the provisions as to relief of an underlessee by bringing an action against him in trespass (in lieu of writ of possession) could be successful; such a proceeding, though based upon the proprietary right, would still be to enforce a right of re-entry.

I turn to the point that no proceedings at all have been taken since the judgment for possession. I cannot think that it was the intention of the legislature that the underlessee must wait until court proceedings by way of execution are actually issued and directed personally at him. That might involve him unwillingly in a cat and mouse game in which the headlessor awaited a favourable opportunity to get possession peaceably during an absence of the underlessee. I think that a proceeding to enforce a forfeiture must remain pending in relation to an underlessee as long as there is a judgment for possession capable of being executed against him. If I am wrong in this I think that the letters of January 2, 1963, threatening the enforcement of the decree if possession was not given, made it clear that the proceedings to enforce forfeiture had not terminated and it was not incumbent upon the underlessees to wait until execution (or a fresh action) was issued or commenced. At the stage of the notice the headlessors must surely be deemed to have been proceeding “by action or otherwise”.

Reference was made by counsel for the headlessors to the terms of the lease under which the headlessors could re-enter on the said land “or any part thereof in the name of the whole”. If I followed his argument correctly it was that the headlessors should be taken as having re-entered on the few remaining plots which had not been subleased. As to this I would say first that there was no evidence of any such entry, secondly that in the absence of any reference to authority I am not satisfied that the taking of judgment for possession does not limit the headlessors to the normal means of enforcement by execution of such judgments and lastly that in my view enforcement of forfeiture against an underlessee of part of the leased premises, means, in the context of the legislation, enforcement by obtaining physical possession against the underlessee.

For the reasons I have given I would hold that when the actions by the underlessees were commenced there were still proceedings in being by the headlessors to enforce the forfeiture and that there was jurisdiction to entertain the underlessees’ applications. I would add that some argument was addressed to the court (without, I felt, any great conviction) as to the effect of the Registration of Titles Ordinance, and the registration thereunder of the decree for possession. All I need say on this subject is that I see nothing in the Ordinance or in the fact of the registration of the decree which, as between the parties, affects the position, or the basis of my judgment.

I would allow the appeal and set aside the judgment and decree in the court below. There was no issue in the Supreme Court whether relief should be granted if there was jurisdiction to grant it. It was apparently accepted that it should be and the only remaining issue was on what terms it should be given. I would therefore remit the case to the Supreme Court for the determination of that issue. As to costs I would order that the underlessees have the costs of the consolidated appeal and would certify for only one set of costs (as on a single appeal) for second counsel. Counsel for the underlessees has also asked for an order for costs in the court below to the extent that they have been increased by the issue of jurisdiction. There seems to be clear authority for this in *Humphreys v. Morten* (20) and *Howard v. Fanshawe* (21). In the former Swinfen Eady, J., said ([1905] 1 Ch. at p. 743):

“I must follow the order in *Howard v. Fanshawe*. The plaintiffs must pay the costs of the action except so far as they have been increased by the lessor’s resisting their claim to relief. The lessor must pay those increased costs, with the usual set-off.

The plaintiffs are clearly bound to pay the costs of obtaining relief: *Croft v. London and County Banking Co.* (1885) 14 Q.B.D. 347; but not the costs as increased by the resistance to that relief.”

I would, therefore, order that the headlessors pay to the underlessees the amount whereby the costs in the Supreme Court have been increased by the issue of jurisdiction; apart from that, the costs of all proceedings in the Supreme Court to be in the discretion of the judge at the subsequent hearing.

Crawshaw JA: I agree with the judgment of the Vice-President, his conclusions and reasoning. I think that the relevant provisions of the Indian Transfer of Property Act, as amended to apply to Kenya, are reasonably clear. That in the circumstances of the case with which we have to deal, statutory forfeiture of the head lease occurred on notice being given by the headlessors to the headlessee, because of the definition of forfeiture under s. 111 (g) of the Act. That being so, the suit instituted by the headlessors was a suit not for forfeiture but for possession and was a “proceeding . . . to enforce forfeiture” under s. 115 (3) of the Act. The distinction with the English Law of Property Act, 1925, is that in the latter there is no definition of “forfeiture”

and that s. 146 (4) thereof (otherwise similar to s. 115 (3) of the Indian Act) relates to a “proceeding . . . to enforce right of re-entry or forfeiture” or, so far as forfeiture is concerned, “a right of forfeiture”. In the event of court proceedings that right would become a forfeiture on election being exercised by the issue of a writ, the forfeiture becoming complete on judgment following proof of the right to forfeiture. I see no justification for giving the restricted meaning to the word “proceeding” in s. 115 (3) of the Indian Act which counsel for the respondents would have us give; I fully associate myself with the meaning given to it by the Vice-President, his reasons for which appear to offend neither the provisions of our own laws nor the principles which appear from the English authorities. I must say that I find difficulty in understanding how a disposition by the headlessee for the full remaining term of the lease could possibly be an under lease, but that was so held by the lower court with the approval of counsel and is not in issue in this appeal.

Crabbe JA: I find myself entirely in agreement with the decision of the learned Vice-President, and with the reasons he gave for it, and I also concur in the order proposed by him.

Appeal allowed. Case remitted to the Supreme Court for determination of the terms on which relief should be granted.

For the appellant:

Inamdar & Inamdar, Mombasa

I. T. Inamdar and J. F. Bowyer

For the respondents:

Sadiq Ghalia, Mombasa

R. P. Cleasby and H. A. T. Anjarwalla

Feroz Begum Qureshi and another v Maganbhai Patel and others [1964] 1 EA 633 (SCK)

Division:	Supreme Court of Kenya at Nairobi
Date of judgment:	15 September 1964
Case Number:	19/1962
Before:	Miles J
Sourced by:	LawAfrica

[1] Rent restriction – Assessment – Standard rent – Apportionment between floors of building – Review – Application for review – Need to show good cause – When court should grant a review.

Editor’s Summary

The appellants owned a building which was subject to the Rent Restriction Acts. In 1952 they applied ex parte and obtained an assessment of the standard rent for the building. At the hearing their advocate submitted that the rent should be assessed at 9 1/2 per cent. of the value of the plot and building and the Board assessed the rent on that basis and apportioned the rent between the three floors at 33 1/3 per cent. each. In 1957 the respondents, who were tenants, applied for review of the original assessment when the advocate for the appellants again submitted that the rent should be assessed as before. In August, 1957, the Board assessed the standard rent at 9 1/2 per cent. and also apportioned the rent between the floors of the building as follows: Ground floor – 50 per cent., First floor – 27 per cent., Second floor – 23 per cent. At this hearing the respondents called evidence but the appellants chose to call no evidence. In 1958 when the appellants applied for review of the assessment made in August, 1957, the magistrate dismissed the application on the ground that no good cause had been shown for reviewing the findings of the Board. The magistrate's refusal was based on the fact that in 1952 and 1957 the appellants' advocate had submitted that the rent should be assessed at 9 1/2 per cent. of the

value of the premises. On appeal it was submitted that the magistrate had taken an unduly narrow view of the power of review conferred by s. 5(1)(m) of the Rent Restriction Act, 1959, and that the magistrate's power of review is unfettered.

Held –

- (i) the power of review under s. 5(1)(m) of the Rent Restriction Act, 1959, places the widest discretion upon the court, the only requirement being that good cause must be shown and what constitutes good cause must depend upon the facts of each case;
- (ii) since the appellants' advocate had on two occasions asked the Board to assess the rent at 9 1/2 per cent. of the value of the plot and building the magistrate was not wrong in refusing to re-open this aspect of the case;
- (iii) at the hearing in August, 1957, there was no evidence before the Board which warranted the change by the Board of the apportionment of rent between the floors; this constituted good cause for reviewing the assessment of the Board in so far as the apportionment was concerned.

Appeal allowed. Case remitted to the resident magistrate to review the apportionment made by the Board.

Cases referred to in judgment:

- (1) *Re Debtor*, [1939] 1 All E.R. 735; [1939] Ch. 489.
- (2) *Willis v. New Hacknall Colliery Co. Ltd.*, [1944] 1 All E.R. 209.
- (3) *Jones v. Curling* (1884), 13 Q.B.D. 262.
- (4) *Ram Nath Dhir* (1952), 25 K.L.R. 67.
- (5) *Gatti v. Shoosmith*, [1939] 3 All E.R. 916.
- (6) *Shabir Din v. Ram Prakash Anand* (1956), 23 E.A.C.A. 48.

Judgment

Miles J: This is an appeal by the landlords of certain premises in Nairobi against an order of the resident magistrate, Nairobi, dated April 19, 1962, in which he dismissed an application by the landlords for review of the assessment of the standard rent of the premises.

The premises are subject to the various Rent Restriction Acts, and this particular case has had a long history which I need not recount in detail for the purpose of this appeal. The standard rent for the premises was first assessed on application by the landlords in 1952. The rent was assessed ex parte since the premises were at the time unlet. In 1957, the respondents, tenants, filed an application to review the original assessment. This was heard by the Rent Control Board, and evidence was given on behalf of the respondents by a Mr. Flatt. No evidence was called by the appellants. The Board decided on an apportionment of the rent between the floors of the building as follows:

Ground floor 50 per cent.

First floor 27 per cent.

Second floor 23 per cent.

The Board also adopted a figure of 9 1/2 per cent. of the 1939 value of the plot, plus the market value of the building. On July 3, 1958, the appellants applied for a review of the assessment of the rent made by the Board on August 15, 1957. The Board held, in the first instance, that there was no power to review a review and the landlords appealed to the Supreme Court and thence to the Court of Appeal for Eastern Africa, which held that there was no limit to the number of reviews which could be made under the Rent Restriction Act. The matter ultimately came before the resident magistrate, Nairobi, on March 29, 1962. The learned resident magistrate held that no good cause had been shown for reviewing the findings of the Board and the application for review was

dismissed. I should mention that the application for review, in the first instance, was confined to the apportionment of the rent as between the various floors of the building, but in the course of the hearing it was extended to include the question of the appropriate percentage of the value of the plot and the building, which the Board had assessed at 9 1/2 per cent.

Counsel's submission on behalf of the appellants is that the learned resident magistrate has taken an unduly narrow view of the power of review conferred by the Rent Restriction Act. The relevant provision is s. 5(1)(m) of the Rent Restriction Act No. 35 of 1959, which empowers the court:

"At any time, of its own motion, or for good cause shown on an application by any landlord or tenant to re-open any proceedings in which it has given any decision, determined any question, or made any order, and to revoke, vary or amend such decision determination or order, other than an order for the recovery of possession of premises or for the ejectment of a tenant therefrom which has been executed."

It is necessary to consider first, which is the power of review conferred by the Act upon the court, which has now taken the place of the Rent Control Board; secondly, whether the learned resident magistrate has rightly interpreted the powers of the court; and thirdly, whether there was good cause shown by the appellants for a review.

Counsel for the appellants' contention is that the section is framed in the widest possible terms and that the magistrate's power to review is unfettered and is not subject to the restrictions on that power which are imposed by the corresponding provisions in the Civil Procedure Code.

It is relevant to refer to the provisions in the Civil Procedure Code affecting review, which are contained in O. XLIV, r. 1, of the Civil Procedure (Revised) Rules, 1948:

"1.(1) Any person considering himself aggrieved –

- (a) by a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or
- (b) by a decree or order from which no appeal is hereby allowed;

and who from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reasons, desires to obtain a review of the decree passed or order made against him, may apply for a review of judgment to the court which passed the decree or made the order."

Comparison of these two provisions supports counsel for the appellants' interpretation, and I do not think that counsel for the respondents contended that the principles upon which a review is granted under the Civil Procedure Code apply in the case of a review under s. 5(1)(m) of the Rent Restriction Act, 1959.

I do not think that much assistance can be derived from the English authorities. Counsel for the appellants has cited *Re a Debtor* (1). This was an application under s. 108 (1) of the Bankruptcy Act, 1914, which confers upon the court the power to review, rescind or vary any order made by it under its bankruptcy jurisdiction. It will be noted that under that section there is no requirement of "good cause", and the actual decision turned upon the question whether the court had jurisdiction to review an order after the bankrupt had been discharged. This case has no bearing upon the point at issue here.

Counsel for the appellants also cited *Willis v. New Hacknall Colliery Co. Ltd.* (2). This was a case under the Workmen's Compensation Act, 1925, and here again there was no requirement of good cause.

Counsel for the respondents has referred to the case of *Jones v. Curling* (3). This concerned the interpretation of O. LXV, r. 1, of the rules of the Supreme Court, which provides that "the costs of all proceedings shall be in the discretion of the judge . . . provided also, that where any action, cause, matter, or issue is tried with a jury, the costs shall follow the event unless the judge by whom such action, cause, matter or issue is tried, or the court, shall, for good cause, otherwise order." Bowen, L.J., said ((1884), 13 Q.B.D. at p. 271):

"It appears to me that these latter words restore costs to the discretion of the judge, provided a condition precedent is fulfilled; that is to say, provided there is good cause. But unless there are facts for which a reasonable man might think the exceptional order was one which was more just than allowing the costs to take the ordinary course, there can be no good cause, and if there is no good cause then the judge had no jurisdiction."

If counsel for the respondents' contention is that exceptional circumstances must be shown to constitute good cause, I think that this goes rather beyond the decision in *Jones v. Curling* (3). It must be borne in mind that the normal rule under O. 65, r. 1, is that costs follow the event and that it is only in exceptional cases that a different order can be made.

In my opinion the power of review under s. 5(1)(m) of the Rent Restriction Act, 1959, places the widest discretion upon the court, the only requirement being that good cause must be shown. Good cause is not restricted by any of the limitations imposed under O. XLIV, r. 1, of the Civil Procedure Rules, and what constitutes good cause must depend upon the particular facts of each case. It would be undesirable for me to attempt to define the circumstances which would constitute good cause, and I quote again from the judgment of Bowen, L.J., in *Jones v. Curling* (3) ((1884), 13 Q.B.D. at p. 271):

"Now I have always entertained the strongest opinion that the court would be acting ultra vires if it were to lay down a hard and fast line upon which discretion should be exercised when the Act of Parliament or judicature rule which creates the discretion gives it in ample and unqualified terms."

It is now necessary to consider the other two questions, namely, whether the learned magistrate adopted the correct principle and whether there was good cause shown by the landlords for a review. I will deal first with the question of the percentage. The ground upon which the learned magistrate refused to review this particular matter was that on two occasions, namely, on December 17, 1952, when Mr. R. N. Khanna, representing the landlords, appeared before the Board he stated that the landlords should be allowed 9 1/2 per cent. which figure was, in fact, allowed; similarly, on August 15, 1957, the landlords' then advocate said the percentage should stay at 9 1/2 per cent. This figure was also upheld on that occasion by the Board. The learned magistrate pointed out that no reason has been given why on these two occasions the landlords' advocate asked for 9 1/2 per cent.

Counsel for the appellants states that the learned magistrate should have borne in mind the decision in *Ram Nath Dhir* (4) where it was held that there is a discretion under s. 21 (A) of the Increase of Rent (Restriction) (Amendment No. 2) Ordinance, 1949, to fix the standard rent at a sum which is less than 10 per cent. of the cost and value, but reasons for such reduction should be given

or should be apparent on the record. Counsel for the appellants contends that even a negligent mistake on the part of an advocate may constitute good cause for a review, and he cites *Gatti v. Shoosmith* (5), where there was an application for time for entering an appeal to be extended on the ground that failure to enter the appeal within time was due to a mistake on the part of the applicant's legal adviser. It was held that there was nothing in the nature of such a mistake to exclude it from being a proper ground from allowing the appeal to be effective, though out of time; and whether the matter should be so treated must depend on the facts of each case. Similarly, *Shabir Din v. Ram Parkash Anand* (6), was a case where there was an application to set aside an ex parte judgment under O. IX, r. 20, of the Civil Procedure Rules. This rule provides – so far as is material:

“But he may apply for an order to set the dismissal aside, and, if he satisfies the court that there was sufficient cause for non-appearance when the suit was called on for hearing, the court shall make an order setting aside the dismissal.”

I do not think that there is any difference between the words “sufficient cause” and “good cause”. What had happened in that case was that there was a mistake on the part of the advocate. It was held that a mistake or misunderstanding of the plaintiff's legal adviser, even though negligent, may be accepted as a proper ground for granting relief under O. IX, r. 20, although this depended upon the facts of the particular case, it being neither possible nor desirable to indicate in detail the manner in which the discretion should be exercised.

It is to be noted that in both these cases the court expressly stated that the question how the discretion should be exercised depended upon the circumstances of each case. An accidental omission, however, on the part of an advocate to take a certain procedural step stands upon a different footing from an express request made by the advocate to the court to take a certain course, and it cannot be said that the learned magistrate was wrong in the circumstances of the present case in refusing permission to the appellants to re-open this particular matter.

I now come to the question of the apportionment. The tenants' expert, Mr. Flatt, gave evidence before the Board, and first quoted the apportionment as to 60 per cent. for the ground floor and 20 per cent. for each of the two upper floors. He later altered this and apportioned 40 per cent. to the ground floor and 30 per cent. to the other two floors. The Board apportioned the rent as to 50 per cent. for the ground floor, 27 per cent. for the first floor and 23 per cent. for the second floor.

In his ruling, the learned magistrate said this:

“Mr. Flatt was cross-examined by the landlords' advocate. The landlords' advocate chose to call no evidence. What this application is now saying is: ‘I do not think the decision you have reached is correct. Seeing that I do not like it, I now wish to call the evidence I elected not to call at the hearing before the Board.’

In my opinion, these are not good cause for a review. It was in the power of the advocate to have called evidence and raised all the arguments in support of para. 2 of the application at the hearing before the Board. Further, he could have called the witnesses he has suggested he should call before the court, before the Board. They would have been giving evidence concerning facts which occurred before the Board's finding, and not of circumstances which have since changed. Having failed to call this evidence at the proper time does not constitute a good cause for review.”

Counsel for the appellants contends that the learned magistrate is here saying that it is necessary, before a review can be granted, for the applicant to show that there has been a change of circumstances. If this is so, it would, of course, amount to a mis-direction. The concluding remarks in the ruling, “they would have been giving evidence concerning facts which occurred before the Board’s finding, and not of circumstances which have since changed” support counsel for the applicants’ construction. It may be that the learned magistrate had in mind the remarks of the learned President of the East African Court of Appeal in this case:

“Since circumstances affecting rents may easily change more than once, and may easily entail more than one review, it could not have been the intention of the rule-making authority, by applying generally Rules of Civil Procedure so far as circumstances permit, to curtail an express and special provision of the rent restriction legislation.”

It is possible that the learned magistrate construed these observations as meaning that a change of circumstances must be shown, although it is true that he does not expressly say so. A change of circumstances is only one of the factors to be taken into consideration in deciding whether a review should be granted.

The learned magistrate appears to have given two reasons for his decision, the second being that the landlord’s advocate refrained from calling evidence. In this connection, it should be borne in mind that the Board’s original assessment of the premises apportioned the rent between the three floors at a 33 1/3 per cent. each. Mr. Flatt’s final assessment at 40 per cent., 30 per cent. and 30 per cent. represented a difference of only 3 1/2 per cent in relation to the two upper floors, and it may well be that the landlord’s advocate did not consider that this warranted the calling of evidence. The subsequent decision of the Board to apportion the rents for the first and second floors at 27 per cent. and 23 per cent. respectively, could hardly have been anticipated, and must have come as a bolt from the blue. Had the Board accepted Mr. Flatt’s final figures, it might well be that the landlord’s advocate, having taken no step to rebut Mr. Flatt’s evidence, would not be entitled to come to the court and apply to have the matter re-opened, but that is not what happened. In the circumstances, it might be thought, with due respect to the learned magistrate, that his description of the landlord’s attitude as “Seeing that I do not like it, I now wish to call the evidence I elected not to call at the hearing before the Board” was somewhat harsh.

Considerable argument was addressed to me on the question whether an applicant for review should be permitted to call evidence in order to show good cause or whether counsel for the appellants, when he appeared before the learned magistrate, did indicate an intention to call such evidence. I do not propose to go into this question because there is material on the face of the record, which shows good cause, in that, there was no evidence before the Board upon which they were warranted in making the apportionment which they did and for which, incidentally, no reasons were given. The learned magistrate was, therefore, wrong in refusing a review so far as the apportionment was concerned. The appeal is allowed and the case will be remitted to the Court of the Resident Magistrate Nairobi, to review the assessment of the Board so far as the apportionment is concerned. I will hear argument as to costs.

Appeal allowed. Case remitted to the resident magistrate to review the apportionment made by the Board.

For the appellants:

D. N. & R. N. Khanna, Nairobi

D. N. Khanna

For the respondents:
Sampson & Ransley, Nairobi
R. N. Sampson

Mpanda General Agency v Kassamali Kanji and Brothers
[1964] 1 EA 639 (HCT)

Division: High Court of Tanganyika at Dar-es-Salaam
Date of judgment: 18 August 1964
Case Number: 164/1961
Before: Law J
Sourced by: LawAfrica

[1] Transfer of business – Protection of creditors – Debtor owner of business – Creditor accepting debtor's goods in settlement of debt – Creditor becoming tenant of debtor's shop – Debtor appointed manager of shop – No notice of transfer of business published – Agreement between debtor and other creditor to pay a debt by instalment – Default in payment of first instalment – Judgment obtained by other creditor against debtor – Execution on debtor's goods unsuccessful – Action against transferee of debtor's business – Liability of transferee – Meaning of "liable" in Transfer of Businesses (Protection of Creditors) Ordinance (Cap. 398), s. 2 (T).

Editor's Summary

The plaintiff and defendant were two business firms and were creditors of A. for Shs. 15,000/- and Shs. 18,000/- respectively. On September 28, 1960, the plaintiff and A., who was also a tradesman, agreed in writing that A. should pay his debt by instalments, the first to be paid "at the end of October, 1960", and the last "at the end of December, 1961", and that upon default the plaintiff had "the right to claim the whole debt at once". A. defaulted by not paying the first instalment and on January 3, 1961, the plaintiff filed proceedings and obtained judgment against A. Meanwhile, on October 10, 1960, A. had transferred much of his stock worth about Shs. 15,000/- to the defendant in full settlement of his debt to the defendant. The stock remained in A.'s shop, of which the defendant became tenant. The defendant also obtained a trading licence for the business and engaged A. as manager. When the plaintiff's proceedings for conditional attachment of A.'s shops and goods revealed the defendant's interest therein, the plaintiff filed an action against the defendant as transferee of the business under s. 2 of the Transfer of Businesses (Protection of Creditors) Ordinance. No notice of the transfer of the business from A. to the defendant had been published as required by s. 2 and the defendant's contention was that no such notice was necessary because the defendant had not acquired the goodwill or the whole or substantially the whole of A.'s business. It was further contended that as the first instalment to the plaintiff under the agreement was not due until October 31, 1960, A. was not "liable" to the plaintiff in respect of any debts or obligations of the business on the date of the transfer, namely, October 10, 1960; that "liable" in s. 2 should be construed as meaning under an immediate legal liability to be sued in respect of the debt or

obligation; and that, as the plaintiff had obtained decree against A., his debt had merged into the decree and become extinguished and accordingly the plaintiff had no alternative remedy against the defendant.

Held –

- (i) on October 10, 1960, the defendant acquired the goodwill and the whole or substantially the whole of A.'s property in the trading business; accordingly notice of the transfer of business under s. 2 should have been published;
- (ii) "liable" in s. 2 of the Transfer of Businesses (Protection of Creditors) Ordinance means under an obligation to pay a debt;
- (iii) A. was on the date of transfer under an existing legal liability to the plaintiff to repay his debt and the position was not affected by the first instalment not being due until October 31, 1960; accordingly the defendant was

liable to the plaintiff for A.'s debts or obligations at the date of the transfer of his business to the defendant;

- (iv) the whole tenor of the Transfer of Businesses (Protection of Creditors) Ordinance is to give protection to the creditor whose rights in relation to a particular business have been prejudiced by transfer without due notice to a third party and there is nothing in the Ordinance which prevents a plaintiff from pursuing concurrent remedies against the transferor in respect of his contractual indebtedness, and against the transferee under s. 2 of the Ordinance.

Judgment for the plaintiff.

Cases referred to in judgment:

- (1) *Re Duffy*, [1949] 1 Ch. 28.
- (2) *Re Chapman*, [1896] 1 Ch. 323.
- (3) *Re Hill*, [1896] 1 Ch. 962.

Judgment

Law J: The plaintiff and defendant in this suit are two registered partnership firms carrying on business as wholesale and retail traders in and around Mpanda.

The plaintiff's claim is brought under the provisions of s. 2 of the Transfer of Businesses (Protection of Creditors) Ordinance, Cap. 398, which reads:

"... every person who after the date of the coming into operation of this Ordinance acquires –

- (a) the goodwill; or
- (b) the whole or substantially the whole of the property;

of any trading or manufacturing business or any business of a like nature shall, notwithstanding any agreement to the contrary, be liable for all the debts and obligations for which the transferor is liable in respect of that business at the date of the transfer unless notice of the intended transfer has been published in accordance with the provisions of s. 3 not less than two months or more than six months before the date when the transfer is to take effect."

Two provisos follow which are irrelevant to this suit.

The admitted or proved facts are that in September, 1960, one Amor bin Said bin Sayaad (whom I shall refer to hereinafter as "Amor") was in business as a retail trader at Inyonga, some seventy miles from Mpanda, where he had two shops, the larger of the two being on plot 2 block D. In the course of his trade Amor had become indebted, for goods supplied, to the plaintiff for about Shs. 18,000/- and to the defendant for about Shs. 15,000/-. Both creditors were pressing for the settlement of their accounts. On September 28, 1960, the plaintiff and Amor agreed in writing that Amor should settle his indebtedness by paying Shs. 15,000/- by instalments, the first to be paid "at the end of October, 1960", and the last "at the end of December, 1961", after which Amor undertook to pay the balance of his debt "without undue delay". If default was made in the payment of any instalment, the plaintiff had "the right to claim the whole debt at once". A copy of this agreement is attached to the plaint. Amor made default by failing to pay the first instalment. The plaintiff filed suit against him on January 3, 1961 (Civil Case No. 1 of

1961), and obtained judgment ex parte. Prior to judgment, the plaintiff applied for and obtained an order for the conditional attachment of Amor's shops and goods at Inyonga, and discovered from the Court Broker's subsequent report that the business at

plot 2 block D was being carried on by the defendant, under its own licence, and that the second shop was empty of furniture and goods. Amor himself was found managing the business on plot 2 block D as a salaried employee of the defendant. It is common ground that no notice of the transfer of the business from Amor to the defendant was published as required by s. 2 of Cap. 398. The defendant's contention is that no such notice was necessary, because the defendant claims that it did not acquire the goodwill or the whole or substantially the whole of Amor's business. This is the only issue of fact for decision in this suit. The defendant's managing partner, Mr. Mohamedali Kanji, has deposed that in October, 1960, Amor offered to settle his indebtedness by instalments. Unlike the plaintiff, Mr. Kanji refused this offer, but instead agreed to accept part of Amor's stock, to the value of Shs. 15,000/- in full settlement. Amor duly transferred goods to the value of Shs. 15,000/- which remained in his shop on plot 2 block D. This was on October 10, 1960. The defendant then became the tenant of that plot, and took out a trading licence in its own name. Amor was engaged as manager of the business formerly carried on by him, at a salary of Shs. 300/- a month. In these circumstances, I have no difficulty in finding as a fact that the defendant acquired the goodwill of Amor's trading business. As regards the question whether the defendant acquired the whole or substantially the whole of Amor's property, there is a conflict of evidence. Mr. Kanji has deposed that Amor, having transferred to the defendant Shs. 15,000/- worth of goods from the stock in the shop on plot 2 block B, removed an equivalent amount to his other shop. Mr. Madhani, managing partner of the plaintiff firm, who was familiar with Amor's business, deposed that the value of his stock in the shop on plot 2 block D was between Shs. 15,000/- and Shs. 20,000/-. I find it hard to believe that Amor had stock to the value of Shs. 25,000/- or Shs. 30,000/- in that shop, and that on October 10, 1960, he removed about half of it to his other shop, which the Court Broker found empty three months later. I am also impressed by the fact that Amor, on October 10, accepted full-time employment with the defendant at Shs. 300/- a month. He is unlikely to have done this if he was at the time in possession of substantial stocks. On a balance of probabilities, I find that the defendant, when it acquired Amor's shop and Amor's services, also acquired substantially the whole of Amor's property in the trading business formerly carried on by Amor on plot 2 block D.

The first issue, which is "did the defendant on or about October 10, 1960, acquire the goodwill and/or the whole or substantially the whole of the trading business of the transferor Amor bin Said bin Sayaad?" is accordingly answered in the affirmative.

This leads me to consider the second issue, which is:

"Was Amor liable to the plaintiff for any debt or obligation at the date of the said transfer, and if so is the defendant liable in respect thereof to the plaintiff?"

The answer to this issue depends on the construction of the words "all debts and obligations for which the transferor is liable in respect of that business at the date of the transfer". In this case the transferor was indebted to the plaintiff to the extent of Shs. 18,000/- on the date of transfer, October 10, 1960; but was he "liable" to the plaintiff in respect of that debt on that date, having on September 28, 1960, entered into an agreement to liquidate his indebtedness by instalments, the first of which did not fall due until October 31? Counsel for the defendant submits that Amor was not "liable" to the plaintiff, on October 10, for anything; he was indebted, but the debt merged into the agreement of September 28, under which no liability accrued until October 31, and then only to the extent of one instalment. Counsel for the defendant's argument is that

“liable” in s. 2 (b) of Cap. 398 means “liable to be sued”, and if the plaintiff, on October 10, had sued Amor for the debt owed by him, Amor would have had the perfect defence that he was not liable on that date, by reason of the agreement which deferred his liability until October 31 at the earliest. Counsel for the defendant submits that on October 10 Amor was in the same position as if he had made a promissory note in favour of the plaintiff on September 28, payable on October 31. On October 10, the date of transfer, Amor would have been indebted to the plaintiff, but not liable for the debt until the promissory note fell due on October 31. Counsel for the plaintiff submits that “liable” in s. 2 (b) means no more than “indebted”, and includes a future liability in respect of present indebtedness. Neither side was able to produce any authority to assist the court in interpreting this simple little word in its particular context, but counsel for the defendant has made the point that Cap. 398 makes a serious incursion on the general law of contract, by making a person liable to a debt when he was not a party to the contract which created the debt, and he submits that the Ordinance should therefore be construed strictly, in favour of the person who was not a party to the contract, and that the word “liable” in s. 2 (b) or the Ordinance should be construed as meaning under an immediate legal liability to be sued in respect of the debt or obligation. In this connection I have found assistance in the case of *Re Duffy* (1), in which the position of a taxpayer is considered, who in one year makes provision for his income tax liability in the next year, before any legal liability has arisen to pay that tax. In the course of his judgment Lord Greene, M.R., said:

“... taking the construction of these words (‘all liabilities of the company’) I find it impossible to give them a meaning extending beyond what is always perfectly ascertainable without any doubt whatsoever, namely, an existing legal liability, actually existing in law at the relevant date. The words cannot be stretched so as to cover something which in a business sense is morally certain and for which every business man ought to make provision but which in law does not become a liability until a subsequent date.”

In my opinion, Amor was on October 10, under an existing legal liability to the plaintiff to repay his debt, and the fact that by the agreement of September 28, he was not liable to be sued until and unless he failed to pay instalments, the first of which fell due after October 10, does not effect the position. Amor was, on October 10, under an obligation to the plaintiff in respect of his debt arising from the business done between himself and the plaintiff. As Kekewich, J., said in *Re Chapman* (2) “liable” means very little more than “under an obligation”, and in *Re Hill* (3) “liable must mean, to some extent, under an obligation”. Amor was, on October 10, under an obligation to repay his debt in accordance with the agreement executed by him on September 28. I can see no justification for interpreting the word “liable” in the restricted sense of “liable to be sued”. It is immaterial, so far as the defendant is concerned, whether Amor’s indebtedness rendered him liable to be sued on the date of the transfer, or whether his liability to be sued had been deferred by agreement, or by the giving of a promissory note. The essential point is that on October 10, 1960, Amor was under an obligation to pay a debt to the plaintiff. As I have already found that the defendant acquired the goodwill and substantially the whole of Amor’s property in his trading business, it follows that the second issue must be answered in the affirmative. Amor was liable to the plaintiff for his debt or obligation existing at the date of the transfer of his business to the defendant, and the defendant is liable to the plaintiff in respect thereof.

The third and final issue is:

“is the plaintiff debarred from proceeding against the defendant because the plaintiff has already obtained a judgment against Amor?”

The plaintiff obtained an ex parte decree against Amor on April 11, 1961, for Shs. 15,000/-, but that decree is still unsatisfied. Counsel for the defendant submits that in these circumstances Amor's debt has merged into the decree and become extinguished, and that as the plaintiff has chosen to proceed against the transferor, he had no alternative remedy against the transferee. Again no authority is cited in favour of this proposition. The whole tenor of the Transfer of Businesses (Protection of Creditors) Ordinance is to give protection to the creditor whose rights in relation to a particular business have been prejudiced by the transfer without due notice of that business to a third party. By s. 4, the transferee is entitled to an indemnity from the transferor for all amounts for which the transferee is made liable under the Ordinance, and by s. 5 nothing in the Ordinance relieves either the transferor or the transferee from any liability to which he would otherwise be subject. I can find nothing in the Ordinance which prevents the plaintiff from pursuing concurrent remedies, against the transferor in respect of his contractual indebtedness, and against the transferee under s. 2 of the Ordinance. Of course, if the decree against the transferee had been satisfied in whole or in part, the liability of the defendant in this suit as transferee would be correspondingly reduced, but as the plaintiff has not been able to extract anything from the transferor, he is entitled to look at the defendant as transferee for the satisfaction of the transferor's debt, and the defendant in his turn can look to the transferor for indemnity, under s. 4 of the Ordinance.

The third issue is therefore answered in the negative.

It follows from my findings on the first three issues that the plaintiff, who has succeeded on all of them, is entitled to judgment. No argument has been addressed to me with regard to the claim for interest at 9 per cent. per annum. It is within my knowledge that this rate is normal for overdue commercial debts in this country.

The fourth issue is "to what sum, if any, is the plaintiff entitled?" I hold that he is entitled to judgment on his claim for Shs. 15,000/- in full, with interest at 9 per cent. per annum from October 10, 1960, until today, and with interest at 6 per cent. per annum on the decretal amount thereafter until payment, and I give judgment for the plaintiff accordingly, with costs.

Judgment for the plaintiff.

For the plaintiff:

Avtar Singh, Dar-es-Salaam

For the defendant:

J. L. Shah, Dar-es-Salaam

Vamos and Partners v S F Hassan **[1964] 1 EA 644 (SCK)**

Division:	Supreme Court of Kenya at Nairobi
Date of judgment:	17 July 1964
Case Number:	412/1962
Before:	Madan J

[1] Costs – Action abated against deceased defendant – Application by administrator for declaration that suit abated – Costs – Whether administrator entitled to costs of suit and application.

Editor's Summary

The administrator of a deceased defendant applied for a declaration that a suit against the deceased had abated and for costs of the suit and the application. There was no dispute that the suit had abated ipso facto by virtue of the provisions of O. 23 r. 4 (3) of the Civil Procedure (Revised) Rules, 1948, but counsel for the plaintiff submitted that no order for costs should be made as the applicant, not having been impleaded, was not a party to the suit and in any event no substantive order could be made until the legal representative of the deceased defendant has been brought on the record.

Held –

- (i) an order for costs is mostly of a consequential nature and in the instant case it was not substantive because the suit had abated by operation of law;
- (ii) a deceased defendant's estate is entitled to move the court for an order for costs of the suit after the suit has abated;
- (iii) the deceased's legal representative could not be made a party to the suit as it had abated by operation of law but it was equitable that the applicant should have an order for the costs of the suit and the application under the inherent powers of the court.

Order accordingly.

Judgment

Madan J: This is an application which asks for a declaration that the suit has abated as against the deceased defendant and for costs of the suit and application.

On the facts, there is no dispute the suit has abated ipso facto by virtue of the provisions of O. 23 rule 4 (3) of the Civil Procedure (Revised) Rules, 1948. To that extent the declaration asked for is unnecessary.

It is objected that no order for costs should be made as the applicant not having been impleaded is not a party to the suit and in any event no substantive order can be made until the deceased defendant's legal representative has been brought on the record.

As regards the second objection, what is being asked for is not an order on merits. An order for costs is mostly of a consequential nature and in this instance it could not be substantive in any event because the suit has abated by operation of law.

The first objection raises a point of procedure. I am inclined to think that a deceased defendant's estate must be able to move the court to ask for an order for costs after a suit has abated. But could the deceased's legal representative be made a party in such circumstances. I am impressed by counsel for the applicant's argument and I also think the answer is no, because the suit having abated the legal representative could not board a train which has already departed

from the platform. The court should in such circumstances, I think, invoke its inherent powers. I consider it equitable the deceased defendant's estate should gain an order for costs in a matter of this kind which has come to an end by abatement.

There will therefore be an order for costs of the suit and this application as prayed.

Order accordingly.

For the plaintiff-respondent:

B. Sirley & Co., Nairobi

D. N. Khanna

For the applicant:

D.N. & R.N. Khanna, Nairobi

A. Esmail

Donnebaum v Mikolaschek
[1964] 1 EA 645 (SCK)

Division:	Supreme Court of Kenya at Nairobi
Date of judgment:	16 September 1964
Case Number:	341/1964
Before:	Rudd J
Sourced by:	LawAfrica

[1] Practice – Service outside jurisdiction – Action for defamation – Plaintiff alleging publication in Austria – Defendant not ordinarily resident in Kenya when action brought-Validity of service on defendant in Tanganyika.

Editor's Summary

The plaintiff brought an action in Kenya on April 27, 1964, claiming damages for libel. The plaintiff alleged that the libel was published in Austria. An application was made for leave to serve the defendant in Tanganyika outside the jurisdiction and the affidavit supporting the application stated that the cause of action was founded on libel published in Austria and also in Kenya and that at the time the suit was begun the defendant was ordinarily resident in Kenya. Under O.V. r. 21 (c) of the Civil Procedure (Revised) Rules, 1948, the court has jurisdiction to allow service of a summons outside the jurisdiction where relief is sought against any person domiciled or ordinarily resident in Kenya. Accordingly the court made an order for service outside the jurisdiction. The defendant having been served in Tanganyika, applied to have service set aside on the ground that he was not ordinarily resident in Kenya

when the suit was instituted. The defendant averred that he had ceased to reside at his house in Kenya on April 25, 1964, although he did not vacate it or leave Kenya until April 27.

Held –

- (i) on April 27, 1964, the defendant was not ordinarily resident in Kenya;
- (ii) service outside the jurisdiction can be allowed where the suit is founded on a tort committed in Kenya but the plaintiff did not allege publication of the libel in Kenya and although the affidavit in support of the application for leave to serve out of the jurisdiction averred that the libel was published in Kenya it did not aver that such publication was by the defendant or that the defendant was responsible for it; accordingly no sufficient ground had been shown to justify the order for service out of the jurisdiction.

Order that the service of the summons on the defendant be set aside.

Judgment

Rudd J: This is a motion to set aside service out of the

jurisdiction effected on the defendant in Tanganyika pursuant to an order of this court made on May 18, 1964. The suit is a suit for damages for libel alleged by the plaintiff to have been published in Austria and further alleged in the affidavit supporting to the application for leave to serve the defendant in Tanganyika but not so alleged specifically in the plaintiff, to have been published in Kenya as well as in Austria. The suit was filed on April 27, 1964.

The defendant seeks to have the service set aside on the ground that he was not ordinarily resident in Kenya when the suit was instituted and supports the application by an uncontradicted affidavit which sets out the following facts:

1. That he arrived in Kenya in February, 1963, and was temporarily employed by the Kenya Government as medical officer, Embu Hospital, Embu, Kenya.
2. That he had been in negotiations to purchase a practice in Dar-es-Salaam since November, 1963, and these negotiations were concluded in March, 1964.
3. That he resigned from his position with the Kenya Government on March 22, 1964.
4. That he left his Government house at Embu on April 25, 1964, for Nairobi and only returned to Embu on April 27, 1964, to collect his salary, return the key of the house and collect his suitcases which were already packed in the house.
5. That he then immediately left for Tanganyika on April 27, 1964, and camped on the Tanganyika side of the Namanga River that night.
6. That he has a flat in Vienna.

The affidavit further states that he was not resident in Kenya when the suit was filed but I think that averment may fairly be considered as an instance of *petitio principii*.

I think the fact that the defendant has a flat in Vienna is relatively immaterial since he had not lived in it for over a year and I have no doubt but that he was in law ordinarily resident in Kenya from about February, 1963, to some time in April, 1964. Equally there is no doubt but that he ceased to be ordinarily resident in Kenya at the latest on April 27, 1964, which was the date on which the suit was instituted and the date on which he left Kenya for Tanganyika with the intention of ceasing to reside in Kenya and of taking up residence in Tanganyika.

The question is, was he ordinarily resident in Kenya on April 27, 1964. If he was, then I think the motion must fail since in my opinion if he was ordinarily resident in Kenya on April 27, 1964, it would not matter if the suit was instituted at some time on that day which was subsequent to the time on that day when he left his residence. I do not consider that the matter depends on hours or minutes in that sense. Up to April 25, 1964, he was ordinarily resident at the house at Embu and he did not formally give up that house until April 27, 1964. He still used it for part of that day to keep some of his residential effects in it. But he did not live in it on that day and he left it for good on that day. I find this a difficult matter to decide and one in which the decided cases cited to me seem to my mind to have little bearing because these cases do not rest on similar facts and the question is one of fact.

On the whole in the circumstances disclosed I think that the defendant was not ordinarily resident in Kenya on April 27, 1964. He did not live in the house at Embu after April 25, 1964, and he was not ordinarily resident at the places where he stayed in Nairobi from April 25 to 26, 1964, inclusive. He only returned to the house on April 27 for the purpose of collecting his bags which were already packed. It is true that he had the key until sometime on April 27 but that

fact alone does not necessarily constitute ordinary residence. On these facts I do not think that he can fairly be considered to have been ordinarily resident in the house at Embu on April 27 and he was thus ordinarily resident anywhere else in Kenya.

For this reason I hold that the service on the defendant out of the jurisdiction cannot be justified on the basis that the defendant was ordinarily resident in Kenya when the suit was filed.

Service out of the jurisdiction can however be allowed where the suit is founded on a tort committed in Kenya but the plaintiff does not allege the commission of a tort in Kenya. It only alleges a publication or publication in Vienna which is outside Kenya. It does not allege re-publication in Kenya or that the defendant authorised anyone to re-publish the libel or knew that such re-publication was likely though as to this it must be noted that publication is alleged to the chief editor of a newspaper which may well make the defendant prima facie liable for any re-publication in the newspaper in Kenya. It is publication which makes a libel. The affidavit supporting the application for leave to serve out of the jurisdiction avers that the libel was published in Kenya but it does not aver that this publication in Kenya was by the defendant or that the defendant was responsible for the publication in Kenya. In the circumstances I do not think that sufficient ground was shown to justify the order for service out of the jurisdiction. Good grounds must be shown by the person who seeks leave for such service and I think that when the matter is questioned it is for that person to substantiate such grounds.

For these reasons I allow the objection and set aside the service on the defendant in this case and discharge the order allowing such service. No question has been raised as to whether service out of the jurisdiction in Tanganyika should be of a notice or as appears in this case a summons itself. I would add that I do not find any copy of a formal order giving leave to serve out of Kenya. It seems that none was made out. I have enquired about this in the office and I am informed that such orders are not formally drawn up where service is allowed in one of the East African countries. I have not enquired further into that as no point has been made of it in this case but I would have thought that it was necessary to draw up a formal order so that a copy could be served with the summons or notice.

I allow the motion with costs payable forthwith on taxation.

Order that service of the summons on the defendant be set aside.

For the plaintiff:

B. Sirley & Co. Nairobi

A. Esmail

For the defendant:

Archer & Wilcock, Nairobi

P. Le Pelley

Income Tax Commissioner v A K
[1964] 1 EA 648 (SCK)

Division: Supreme Court of Kenya at Nairobi

Date of judgment: 13 March 1964

Case Number: 106/1963

Before: Madan J

Sourced by: LawAfrica

[1] Income tax – Assessment – Objection – Notice of objection not given within prescribed time – Taxpayer not prevented by absence, sickness or other reasonable cause – Commissioner’s acceptance of later notice of objection – Agreement to issue amended and reduced assessment – Payment by taxpayer pursuant to agreement – Agreement repudiated by Commissioner – Action for recovery of tax paid on original assessment – Whether acceptance of late notice of objection ultra vires – Whether original assessment superseded by agreement to issue amended assessment.

[2] Estoppel – Equitable estoppel – Income tax – Assessment issued – Notice of objection not given within prescribed time – Commissioner’s acceptance of late notice of objection – Agreement to issue amended and reduced assessment – Payment by taxpayer pursuant to agreement – Agreement repudiated by Commissioner – Action for recovery of tax based on original assessment – Whether Commissioner estopped from relying on original assessment.

Editor’s Summary

The plaintiff served on the defendant notices of assessment for the years of income 1953 to 1957. The defendant did not dispute the assessments by notice in writing to the Commissioner within the time prescribed by s. 109 (1) of the Income Tax (Management) Act, 1958. However, through representations made by the defendant’s accountant to an income tax assessor, the assessor agreed to accept late notice of objection, to reduce the income assessed to an agreed sum and to issue amended notices of assessment. It was common ground that the defendant was not prevented from giving notice of objection because of absence, sickness or other reasonable cause and that the defendant had paid income tax pursuant to the agreement. The plaintiff, however, repudiated the agreement and filed an action for recovery of unpaid income tax, additional tax and penalties based on the original assessments. The defendant’s defence was that he had acted upon the agreement reached with the assessor, that the original assessments had been superseded by the agreement to issue amended assessments and that the plaintiff was estopped from relying on the original assessments. For the plaintiff it was contended that the acceptance by the Commissioner of late notice of objection was ultra vires because the defendant had not given notice of objection within 30 days and had failed to satisfy the Commissioner that he had complied with the conditions precedent to admittance of the late notice of objection under the proviso to s. 109 (1) of the Act. It was further contended that estoppel cannot be claimed against a person acting in the exercise of statutory powers or to prevent him from repudiating an act which was beyond the scope of his statutory powers.

Held –

- (i) the defendant had complied with all the requirements of the proviso to s. 109 (1) of the Act, with the result that the notice of objection which was accepted by the Commissioner was not ultra vires and therefore it was a valid notice;
- (ii) the plaintiff was estopped from relying upon the original assessments.

Suit dismissed.

Case referred to in judgment:

(1) *Inland Revenue Comrs. v. Bladnoch Distillery Co. Ltd.*, [1948] 1 All E.R. 616.

Judgment

Madan J: In this suit the plaintiff, the Comr. of Income Tax, asks for judgment against the defendant for Shs. 75,732/- being balance of unpaid income tax, additional tax and penalties due for the years of income 1953 to 1957.

The facts which are not challenged are:

1. Notices of assessments were served upon the defendant in respect of the years of income in question.
2. The defendant did not dispute the assessments by notice in writing to the Commissioner within the period prescribed by s. 109 (1) of the Income Tax (Management) Act, 1958.
3. As a result of representations made by the defendant through the person of his accountant to an assessor in the Income Tax Department who was acting on behalf of the Commissioner, the assessor agreed to accept late notice of objection upon which, it is conceded, the assessor was going to act.
4. Agreement was finally reached between the assessor and the defendant's accountant reducing the income assessed. The figures of income finally agreed are as they appear in ex. 3.
5. The assessor agreed to issue amended assessments on the basis of the figures of income in ex. 3. In fact no such amended assessments have been raised.
6. If amended assessments are raised as agreed, the defendant's tax liability would be reduced to about Shs. 26,000/-.
7. The defendant made payments on account under the agreement reached with the assessor.
8. The defendant has paid a total sum of Shs. 67,582/-. The plaintiff has allocated a sum of Shs. 15,400/- to the year of income 1952 to clear the defendant's total tax liability in respect of that year, leaving a balance of Shs. 52,182/- in respect of the years of income 1953 to 1957.
9. The provisions of the 1958 Act apply to this case.

The defendant's case is that he acted upon the agreement reached with the assessor, made payments thereunder and the original assessments were superseded by the agreement to issue amended assessments which has not been done. This suit is therefore premature and the plaintiff is estopped from relying on the original assessments. The question of penalties does not therefore arise. The defendant further seeks specific performance of the agreement reached with the assessor to issue amended assessments. A necessary corollary to the defendant's case is that inasmuch as, according to him, the original assessments were superseded as stated, there are no assessments in existence upon which the plaintiff can sue.

The plaintiff repudiates the agreement and in doing so he seeks refuge under the Act.

I therefore turn to the relevant provisions of the Act.

The plaintiff complied with the provisions of s. 104A in causing notices of

assessments to be served upon the defendant. Such notices stated the amount of income assessed and the amount of tax payable (ex. 1).

Section 109 (1) requires a person who disputes an assessment to notify the Commissioner in writing of his objection within 30 days after the date of service of the notice of assessment. As already stated the defendant did not do so. He did however serve notice of objection on March 2, 1960 (ex. A1).

Counsel for the plaintiff has forcibly argued that the acceptance by the Commissioner of late notice was ultra vires, and therefore of no effect: first, because the defendant did not comply with the procedural machinery in that he did not give notice of objection within 30 days; second, because it is a condition precedent to admittance of a late notice that the Commissioner must be satisfied under the proviso of s. 109 (1) that owing to absence from the Territories, sickness or other reasonable cause, the person objecting was prevented from giving such notice within such period and there has been no unreasonable delay on his part; only then the Commissioner may, upon application by the person objecting, admit such notice after the expiry of such period. The Commissioner cannot exercise the discretion to admit a late notice unless this condition precedent is first satisfied. The first two grounds, i.e. absence from the territories and sickness do not apply in the instant case, and the onus, says counsel for the plaintiff, is upon the defendant to show that he had other reasonable cause which prevented him from giving such notice within the prescribed period. But the defendant has not said he had reasonable cause for not giving the notice in time. The agreement to admit late notice was therefore ultra vires and beyond the Commissioner's powers conferred upon him by the Act. The Commissioner cannot be held bound by it. The assessments have therefore become final and conclusive by virtue of the provisions of s. 114(1)(a) which enacts that where no valid notice of objection has been given the assessment as made shall be final and conclusive for the purposes of the Act. The defendant is precluded from challenging the validity of the assessments now which having become final and conclusive cannot be varied. A further argument is that any statements made by the defendant after the assessments became conclusive, cannot change the final nature of the assessments.

It seems to me the following conditions precedent must be fulfilled before the Commissioner may admit a notice after the expiry of 30 days so that such admitted notice shall be a valid notice:

1. The Commissioner must be satisfied that owing to absence from the Territories, sickness or other reasonable cause, the person objecting was prevented from giving such notice within such period.
2. That there has been no unreasonable delay on his part.
3. The person objecting must apply to the Commissioner to admit the notice.
4. The person objecting must deposit with the Commissioner so much of the tax as is due under the assessment under s. 118, or such part thereof as the Commissioner may require.
5. The person objecting must make payment of any penalty due under s. 120.

Unless each one of these conditions precedent is fulfilled the onus of which is upon the person objecting the Commissioner cannot in my opinion admit a late notice so that the admitted notice shall be a valid notice.

Insofar as the first three conditions are concerned, there is no evidence before me to show on what basis or for what reasons the Commissioner agreed to admit the notice. The Commissioner did however admit it and intimated that it would be acted upon by the issue of amended assessments. It is not now in my

opinion open to the Commissioner to say that he admitted the notice without first being satisfied that the defendant was prevented from giving such notice on the grounds stated in the proviso or any one of them and that there had been no unreasonable delay. The Commissioner must be deemed to have been so satisfied. He has certainly not come forward to say he was not so satisfied. This being the case it is not for this court to delve into the reasons for the Commissioner's action. Indeed none has been disclosed except of course that there was a discussion with the assessor after which notice was given which, if anything, strongly suggests that the matter was discussed and the defendant must have made an application to admit the notice. And notice of objection was given, it was accepted and agreed to be acted upon. In the absence of evidence which is the case here, the court must in the circumstances hold that the Commissioner acted properly in the discharge of his function within the provisions of the Act. Again in the absence of evidence it would I think be untenable for this court to act in the abstract and hold the Commissioner was not so satisfied. It seems to me the question does not arise now. Such onus as lay upon the defendant to satisfy the Commissioner was in my opinion discharged in the circumstances of this case when the Commissioner agreed to admit the notice.

The defendant would also seem to have satisfied condition number four for he deposited with the Commissioner Shs. 10,000/- with his accountant's letter dated June 30, 1960, addressed to the Commissioner (ex. A4). I think this is an important letter in relation to the next condition to be satisfied by the defendant. I therefore set out its full text:

"We refer to our interview on June 14, and as agreed we forward Ahmed Khan's cheque for Shs. 10,000/- to be placed on deposit pending finalisation of his affairs. Further information on some points raised during that interview will be shortly supplied."

No objection has been taken that the defendant did not pay any penalty due under s. 120. Indeed the parties have not referred to this aspect of the matter at all. I do not understand the plaintiff's case to be that the admitted notice was not valid notice because the defendant did not pay any penalty. But I do not think this matters. The court is bound to enquire whether all requirements of the proviso were complied with. The onus was upon the defendant to pay the penalty. In order to give the notice a complete character of validity the onus is upon the defendant now to show that he made payment of the penalty due under s. 120.

It has not been stated, certainly there is no evidence about it, whether the whole of the deposit of Shs. 10,000/- was required to be made as part of tax only. While I do not think the Commissioner was bound to notify the defendant of the penalty due under s. 120, the fact remains the Commissioner did not notify the defendant until April 10, 1962, of the late penalty payments due under that section (ex. B).

The total amount of the penalties said to be due is Shs. 4,266/- as stated in the plaint. It may well have been included in the sum of Shs. 10,000/-. I think it need not necessarily have been paid with the notice of objection; it could properly be paid together with the tax required to be paid. It is true that in their letter dated August 30, 1960 (ex. A5), the defendant's firm of accountants state "our client has since then paid Shs. 20,000/- as then agreed as deposit towards his tax liability." But this by itself is not enough to exclude part of the sum being on account of penalties and it is not enough to make the character of the payment made on June 30, a non-inclusive one. As already stated it may well have included the penalties. I must confess I have felt some difficulty in coming to this conclusion and also to hold that the defendant has discharged the

onus. I have however come to this conclusion by parity of reasoning on the authority of the principle stated by Lord Thankerton in *Inland Revenue Comrs. v. Bladnoch Distillery Co. Ltd.*, ([1948] 1 All E.R. at p. 625):

“... if the provision is reasonably capable of two alternative meanings, the courts will prefer the meaning more favourable to the subject ...”

If the letter of June 30 is capable of two alternative meanings, the court should in this case in my opinion prefer the meaning more favourable to the defendant.

In the circumstances the only reasonable conclusion to come to is that the defendant complied with all requirements of the proviso with the result that the notice of objection which was admitted by the Commissioner was not ultra vires and it was a valid notice. I so hold.

I am in agreement with counsel for the plaintiff's argument that in the case of a person who is served with a notice of assessment and who fails to serve a valid notice of objection the assessment as made becomes final and conclusive for the purposes of the Act. It is thereafter binding upon the taxpayer. The reason for such a provision in the Act is I think obvious. The reason I think is to achieve finality in regard to the revenue of the country and liability of taxpayers.

This would be the position in a straightforward case where no valid notice of objection has been given. But that is not the position here. And that I think is the distinction between the instant case and the authorities to which counsel for the plaintiff has referred on this point.

For the same reason I also do not think it necessary to dwell upon counsel for the plaintiff's further argument that the expression “other reasonable cause” is to be construed ejusdem generis with absense from the Territories and sickness.

And also for the same reasons I think the original assessments are no longer binding. Amended assessments as agreed have not been issued. This, by itself, I should think would be the end of the plaintiff's case.

I have however been addressed an interesting argument on the doctrine of equitable estoppel both by counsel for the plaintiff and counsel for the defendant.

Counsel for the plaintiff's argument may be summarised by saying first that estoppel whether in common law or in equity cannot be raised against a person acting in the exercise of his statutory powers or to prevent him repudiating an act which was beyond the scope of his statutory powers; secondly, and in the alternative, a necessary ingredient of equitable estoppel is that the promisee was led to alter his position on the faith of the promise. Inasmuch as the tax liability has not been conveyed to the defendant under amended assessments, he cannot have suffered any detriment.

I understand the law to be that no estoppel, whatever its nature, can operate to annul statutory provisions and a statutory person cannot be estopped from performing his statutory duty or from denying that he entered into an agreement which it was ultra vires for him to make. A statutory person can only perform acts which he is empowered to perform. Estoppel cannot negative the operation of a statute and it is a public duty to obey the law. It is therefore not necessary to consider in detail the various authorities to which counsel for the plaintiff has referred legally illuminating though they are except to say that generally speaking they decide whether the act complained of which was performed or refused to be performed was within the scope of statutory powers. Counsel for the plaintiff conceded however that the validity of his argument depends upon whether acceptance of the late notice of objection is held to be

ultra vires or not.

I think the question which the court must consider is whether estoppel which is claimed in this case will do violence to statutory provisions. It is a question

which must be considered in the light of my finding that the notice of objection was a valid notice.

Take a straightforward case where the Commissioner is satisfied that the person objecting was genuinely prevented from giving notice of objection on any one of the grounds stated in the proviso and the notice is admitted by the Commissioner after compliance by the person objecting with all other requirements. Such admitted notice would be a valid notice. If counsel for the plaintiff's argument is right then even in such a case the person objecting would be denied relief because of the provisions of s. 114 (1) itself contemplates the assessment as made shall be final and conclusive for the purposes of the Act only where no valid notice of objection to an assessment has been given. Any other construction I feel would do violence to the plain language of both the proviso and s. 114 (1).

Therefore once a valid notice of objection has been given, once that stage is reached the defendant is entitled to say the original assessments have not become final and conclusive, that they must be regarded as having been reopened and the matter treated as standing at the point as if the defendant had originally given a valid notice of objection. He is also entitled to say his tax liability has not been determined and the Commissioner cannot therefore sue him. The payment of income tax is the discharge of an onerous obligation. A taxpayer is entitled to avail himself of such limited and narrow avenues of relief as are provided for in the Act. A taxpayer is entitled to ask for implementation of any relief that may have thus become available to him.

I find myself unable to accept counsel for the plaintiff's submission that a necessary ingredient of equitable estoppel is the promisee should have been led to alter his position on the faith of the promise. I do not think so, for I consider it is enough if the promisee acted on it as the defendant did in the instant case. I think counsel for the plaintiff's argument has overlooked the difference between what I would call ordinary estoppel and promissory estoppel. It is therefore not necessary that amended assessments should have issued before estoppel can be evoked. The plaintiff cannot take advantage of his own omission in refusing to issue amended assessments to enable him not to implement the agreement to do so.

The promissory estoppel must however be intended to affect the legal relations between the parties. The expression legal relations must in my judgment include revision of assessments already made an issue of amended assessments which would affect the taxpayer's legal liability. The legal relationship between the parties here is the duty to collect and pay the tax.

The final point for consideration is whether the Commissioner is being asked to do anything which is either beyond or the performance of which would result in a violation of his statutory powers. Is he being asked to act inconsistently with his statutory powers! I must say I cannot see it that way. The Commissioner is empowered to amend assessments. He is empowered under s. 120 (3) in his discretion to remit the whole or any part of the penalty. The defendant is asking him to do no more than to exercise the powers which lie within his statutory competence. Need it be said that in a case where the Commissioner is satisfied that a late notice of objection should be admitted so that it is a valid notice, it would be unjust thereafter to refuse to adjust the true tax liability of the person objecting. It would be tantamount to a refusal to perform statutory duty. The interests of justice require that the Commissioner do perform his statutory duty under the Act by assessing the defendant for his true tax liability.

I do not find it possible to accept counsel for the plaintiff's argument that the defendant does not suffer by the Commissioner's assertion of his statutory rights. The defendant must suffer so long as statutory rights are sought to be enforced without taking into account the valid notice of objection given by the defendant and admitted by the Commissioner, and also by the refusal to issue amended assessments.

For all the foregoing reasons my conclusion is that the plaintiff is estopped and this suit must fail with costs.

There yet remains the defendant's plea that the plaintiff do perform his agreement to issue amended assessments. Once again I confess that it is not without hesitation I come to the conclusion that I must refuse the defendant the relief which he seeks in this form. Having stated that the plaintiff is estopped from suing the defendant, I consider the question does not arise and the counterclaim becomes unnecessary. The Commissioner must be left to take such legal remedies as may be available to him to collect such tax as may be due. I do not consider it to be a function of this court to compel the Commissioner to issue any amended assessment. The counterclaim therefore fails with costs.

Counsel for the plaintiff asked for as well conceded costs of two counsel depending upon the result. I agree with him. I think this case is fit to certify two counsel except that in the case of the defendant counsel is also certified.

Suit dismissed.

For the plaintiff:

The Legal Secretary, E. A. Common Services Organisation

P.J. Treadwell and M.G. Muli (Senior Assistant Legal Secretaries, East African Common Services Organisation)

For the defendant:

M. L. Anand, Nairobi

Clive Salter, Q.C., J. K. Winayak and R. N. Anand

**Sera Mussa v Manji's Ltd and others
Kulsum Sadrudin Bhanji Jiwa v Manji's Ltd
and others**

[1964] 1 EA 654 (HCT)

Division:	High Court of Tanganyika at Dar-es-Salaam
Date of judgment:	3 September 1964
Case Number:	18 and 25/1964
Before:	Reide J
Sourced by:	LawAfrica

[1] Limitation of action – tort-Fatal accident – Action against executors of deceased – Action filed within three years of deceased's death but more than six months after probate granted – Whether action time barred.

Editor's Summary

In two actions which were consolidated the plaintiffs were the widows of two passengers travelling in a car with the deceased who was driving. They sued the executors of the deceased and the company of which he was a director under Part II of the Law Reform (Fatal Accidents and Miscellaneous Provisions) Ordinance claiming damages for the deaths of their respective husbands. the plaintiffs averred that the accident was due to the negligent driving of the deceased and that the company was vicariously liable because the deceased was driving as the agent or servant of the company in the course of his employment, and/or acting under its control and/or with its knowledge or consent at the material time. It was common ground that the actions were filed within three years of the death of the deceased but more than six months after the executors had obtained a grant of probate. It was contended that the period of limitation for commencing proceedings was governed by s. 4 (2) of the Ordinance and not by s. 9(3)(b), and that as the actions were brought within three years of the death of the deceased the actions were maintainable against the executors.

Held –

- (i) the deceased was not at the material time acting in the course of his employment with the company or acting under its control or as its agent or servant;
- (ii) sections 3 and 4 of the Law Reform (Fatal Accidents and Miscellaneous Provisions) Ordinance are concerned only with suits against living tortfeasors, and the three years' limitation provided by s. 4 (2) is applicable where a tortfeasor is alive at the time of the commencement of the proceedings; where, however, he is dead and an action is brought against his estate, the limitation provided by s. 9(3)(b) operates;
- (iii) since the actions were filed more than six months after the executors had obtained a grant of probate they were time barred and not maintainable.

Actions dismissed.

[**Editorial Note:** The rest of the judgment, which is not given here, was concerned with the issues of negligence and assessment of damages.]

Cases referred to in judgment:

- (1) *Piddington v. Co-operative Insurance Society*, [1934] 2 K.B. 236.

Judgment

Reide J: These consolidated cases are concerned with claims arising out of a motor car accident on October 16, 1962, in which the driver, Remtulla Karim Manji, and his two passengers, Ismail Mathew Chando and Sadrudin Bhanji Jiwa, were all killed. I will refer to them throughout as Manji, Chando and Jiwa. The two plaintiffs, Sera Musa and Mrs. Kulsum Jiwa, who I will refer to as the first and second plaintiffs, are respectively the widows of the two passengers, and they each sue the same defendants for damages arising out of the deaths of their respective husbands on behalf of themselves and other dependants under the provisions of Part II of the Law Reform (Fatal Accidents and Miscellaneous Provisions) Ordinance (which I will refer to as “the Ordinance”).

The first defendant is a company, Manji’s Ltd. (which I will call “the company”), of which Manji was a director. The plaintiffs aver that the accident was due to Manji’s negligent driving and that the company is vicariously liable therefor, in that Manji was driving as the agent or servant of the company in the course of his employment with it, and/or acting under its control and/or with its knowledge or consent at the material time. The other four defendants, who for the sake of brevity I will call “the second defendants”, are sued in their capacity as executors of Manji’s estate.

The pleadings in each of the suits are mutatis mutandis identical, except as regards quantum of damages. They embody precisely similar particulars of the negligence alleged. There is evidence to show, and it is not disputed, that on the evening of October 15, 1962, Manji left Dar-es-Salaam for Mbeya, where he lives, in the company’s car, a Mercedes-Benz 220 S.E. saloon, and that Chando and Jiwa were travelling with him as passengers. At some time during the night, probably in the early morning, the car left the road at a point between Iringa and Mbeya and fell into a dry river bed. Some hours later a police superintendent found the car there, damaged, and the bodies of the three men inside, dead. Manji was in the driver’s seat and the other two at the rear. The superintendent took photographs and saw that there

were tyre marks on the road indicating that the car had swerved from the nearside of the road to the offside over a distance of about 100 yards before falling into the river bed.

That is all the evidence I have heard about the accident. I have heard nothing about the mechanical condition of the car either before or after the accident, or evidence to indicate why it had swerved across and left the road. Nor have I heard any medical evidence. I do not know whether the three men were killed instantly or, if not, how long they survived, or what was the immediate cause of the death of any of them, or what injuries they sustained. The particulars of negligence alleged in the complaints not having been proved, and the cause of the accident being unknown, the doctrine of *res ipsa loquitur* must be invoked in order to determine whether or not the accident was due to Manji's negligence.

The following issues were agreed:

1. Was Manji driving negligently at the time of accident?
2. If yea, did Chando and Jiwa die as a result of Manji's negligence?
3. If yea, are the defendants or any of them liable in damages for such negligence?
4. If yea, in what sums?

Assuming that the answers to issues 1 and 2 are in the affirmative, I will first consider issue No. 3. I will say at once that I am satisfied that the answer to that issue is "No, none of them". To deal first with the claim against the company, I am satisfied that Manji was not at the material time acting in the course of employment by the company or acting under its control or its agent or servant.

In this connection I will advert for a moment to a letter, produced on behalf of the second plaintiff, from the advocate for the company's motor insurers to the second plaintiff's advocate. This letter contains matter which, had it been written by or on behalf of the first defendant, might have constituted an admission prejudicial to its case, and I think counsel for the defendants was somewhat concerned about its admission. Since, however, it was not so written, its contents – as I have already held – are not so prejudicial, and I have dismissed them from my mind.

The evidence of Manji's son, Amirali, is that his father, who had a number of business interests other than that of the company (whose principal business is the sale of car tyres), had no car of his own but relied entirely for road travel upon the use of the company's car, which he was accustomed to use for his private purposes as and when he wished, with the full knowledge and approval of his brothers, the co-directors of the company.

Amirali, who is also a director of the company, said that during the period shortly before his death Manji had spent much of his time on the company's business. Much of his leisure time, particularly at weekends, was taken up with playing cards (his son called this his "hobby"), and with watching sporting events. On Friday, October 12, he had set off from Mbeya in the car, which he was using with the consent of the directors, after specifically telling Amirali that he was going to Dar-es-Salaam "just for social or pleasure purposes". There is abundant evidence that Manji spent much of his time on the Saturday and Sunday immediately before the accident playing cards at the Oriental Club in Dar-es-Salaam; that Jiwa was playing there too; and that, as I have said, he, Jiwa, and Chando, started back from Dar-es-Salaam for Mbeya on the evening of October 15. There is no evidence that Manji was carrying either of his passengers for hire or reward; that he travelled to Dar-es-Salaam for business reasons (whether connected with the company or otherwise); that he did any business there either as a director of the company or in any other capacity; or that his return journey was in any way connected with business activities. The most that was elicited from Amirali in cross-examination was his agreement that if his father had happened to meet a representative of a

business firm in Dar-es-Salaam he might have discussed business with him. Such a proposition, so stated, is little more than self-evident, and is in any case nothing but hypothesis.

The plaintiffs ask me to find that it is inconceivable that Manji should have made this long double journey between Mbeya and Dar-es-Salaam, about 500 miles each way, solely for the purpose of playing cards, and that I ought to find that the probability is that the prime reason for his journey was the company's business with their Dar-es-Salaam suppliers. I cannot agree. I do not find that s. 114 of the Indian Evidence Act, which provides that the court "may presume the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events, human conduct and public and private business", obtains here so as to raise a presumption in favour of the plaintiffs' submission. As I have said, there is no scrap of evidence to support the view either that Manji's trip was made for business purposes or that he did any. Few of us perhaps would care to undertake such a long journey by road for the sake of card play, but men's tastes and the strength of their inclinations vary enormously, and moreover there is no evidence, and I am not going to speculate, as to what he may have done on Monday. At the most he may have performed some incidental business (though there is no evidence of that), but even if that were so his trip to and from Dar-es-Salaam would still have been a private pleasure trip and was not one undertaken in the course of his employment or duties as a director of the company, and he would not in consequence have been acting under their control or as their agent while driving. The only case, I think, to which I need refer in support of my view is *Piddington v. Co-operative Insurance Society* (1) where the respondents undertook by their policy to indemnify the plaintiff in respect of third party risks excluding damage and liability arising while the vehicle was being used for other than private pleasure. The plaintiff, in the course of a pleasure trip, conceived the idea that certain laths which he had on his car might be employed in connection with the measurement of some brasswork which his firm had been commissioned to undertake. When he arrived at the place where this work was being carried out, however, he found that he could not do any measuring. It was on his way home that he knocked down and fatally injured a pedestrian. The court found that the idea which crossed his mind of using his laths to measure the brasswork did not turn his pleasure trip into a business trip, so that he was entitled to recover under his policy of insurance.

I next consider the third issue in relation to the second defendants – a question which is concerned with quite different circumstances and considerations.

It is agreed that a grant of probate of Manji's estate was made to the second defendants on March 6, 1963. The first plaintiff's claim was filed on February 20, 1964, and that of the second plaintiff on March 3, 1964; that is, in each case when more than six months had elapsed after the making of the grant.

Part II of the Ordinance is entitled "Fatal Accidents", and comprises ss. 1 to 9. Section 3 provides that a person whose wrongful act has caused the death of another, and who would have been liable in damages to that other if death had not ensued, shall nevertheless be liable to an action in damages; and s. 4 that such action under Part II shall be for the benefit of the deceased's dependants. The second proviso to s. 4 (2) reads: "Every such action shall be commenced within three years after the death of such deceased person;" and it is under these sections that the present proceedings have been brought. If, as the learned advocate for the second plaintiff has submitted, these claims could be considered solely with reference to Part II of the Ordinance, there could be no question but that the suits had been brought in time; but that is not the case. Section 3 treats of the liability of the tortfeasor himself, and makes no reference to his personal representatives or his estate. Those matters are

dealt with in Part III of the Act, that is, in s. 9, sub-s. (1) of which reads in part: “Subject to the provisions of this section, on the death of any person after the commencement of this Ordinance all causes of action subsisting against him or vested in him shall survive against or . . . for the benefit of his estate.”

The plaintiffs’ difficulty arises out of the provisions of s. 9(3)(b), which provides that: “No proceedings shall be maintainable in respect of a cause of action in tort which by virtue of this section has survived against the estate of a deceased person unless proceedings are taken in respect thereof not later than six months after his executor . . . took out representation.”

Counsel for the second plaintiff has submitted, if I have understood him aright, that the words “by virtue of this section” in this subsection limit its application solely to causes of action brought for the benefit of a deceased’s estate, and that the subsection accordingly does not enure to limit the time after a grant of probate when a deceased’s dependants must commence proceedings against the estate of another deceased, but that the limitation imposed upon a plaintiff in such case is determined solely by reference to s. 4 (b). No authority has been advanced for such a proposition, which appears to me clearly without merits. Section 9 (1) is specifically concerned with survival of causes of action both for the benefit of and against a deceased’s estate, and s. 9(3) is concerned only with such survival against such an estate. To put the matter shortly in another way, ss. 3 and 4 considered by themselves are concerned only with suits against living tortfeasors, and the three years’ limitation provided by s. 4 (2) is applicable where a tortfeasor is alive at the time of the commencement of proceedings. Where he is dead and an action is brought against his estate, the limitation provided for by s. 9(3)(b) will operate.

Accordingly I must find that the proceedings against the second defendants are not maintainable, and I answer the third issue by finding that none of the defendants is liable for Manji’s negligence, if negligence there were. The plaintiffs’ suits must accordingly fail.

Action dismissed.

For the first plaintiff:

H. K. Udvardia, Dar-es-Salaam

For the second plaintiff:

K. A. Master, Q.C., Dar-es-Salaam

For the defendants:

A. Roden, Dar-es-Salaam

A. I. Roden

Vallabhdas Pragji v Nasani Lugeba
[1964] 1 EA 659 (HCU)

Division: High Court of Uganda at Kampala

Date of judgment: 11 December 1964

Case Number: 412/1964
Before: Sheridan J
Sourced by: LawAfrica

[1] Evidence – Admissibility – Mortgage – Consideration – Acknowledgment by mortgagor of receipt of larger sum than amount stated in document – Whether parol evidence admissible to prove lesser sum received – Evidence Ordinance (Cap. 9) s. 91 (U.).

[2] Deed – Mortgage – Consideration stated – Whether parole evidence admissible to show true consideration.

Editor’s Summary

The plaintiff claimed Shs. 6,979/- representing the balance of principal, interest and expenses due under a mortgage which stated that the sum advanced was Shs. 15,000/-. The defendant had also signed a receipt for Shs. 15,000/- but in his defence averred that in fact only Shs. 10,000/- was advanced which sum had been repaid. At the hearing parol evidence was adduced to show that only Shs. 10,000/- had been advanced and the question for decision was whether this evidence was admissible in view of s. 91 of the Evidence Ordinance, which excludes it where the agreement is required by law to be reduced in writing.

Held – parole evidence to show that only Shs. 10,000/- was advanced was admissible and on the evidence of the defendant and his witness the Court was satisfied that Shs. 10,000/- only was advanced and that this sum had been repaid.

Suit dismissed.

Cases referred to in judgment:

- (1) *Re Wallis, Ex-parte Lickorish* (1890), Q.B.D. 176.
- (2) *Sah Lal Chand v. Indarjit* (1900), 22 E.R. 370.
- (3) *Hukumchand v. Hiralal* (1876), 3 Bom. 159.
- (4) *Gulamhussein Ibrahim v. Habib Rahemtulla*, Uganda High Court Civil Case No. 724 of 1961 (unreported).
- (5) *Bickerton v. Walker* (1886), 31 Ch.D. 151.

Judgment

Sheridan J: The plaintiff claims Shs. 6,979/-, representing the balance for principal, interest and expenses due under the defendant’s covenant in a mortgage dated December 5, 1958, for a loan of Shs. 15,000/- (Ex. F). This sum is made up of (1) Shs. 4,950/- the balance of the principal amount, (2) Shs. 40/- professional fees to an advocate, (3) Shs. 614/- charges to City Auction Mart, and (4) Shs. 1,375/- interest from November 5, 1959, to June 9, 1964, at 6 per cent. per annum. The loan was to be repayable by four instalments of Shs. 3,750/- each, between February 5, 1959, and November 5, 1959. The plaint was filed on July 3, 1964.

The defence denies the claim for expenses and interest and avers that in fact only Shs. 10,000/- was advanced to the defendant which sum has been repaid.

In evidence the plaintiff stated that the defendant agreed to pay interest at the time of the mortgage. As the mortgage deed is silent on the payment of any interest I ruled that this evidence was inadmissible by virtue of s. 90 and 91 of

the Evidence Ordinance, and counsel for the plaintiff stated that he would not pursue this part of his claim. On the other hand the plaintiff admits that Shs. 10,050/- had been repaid, which suggests that something in addition to the loan of Shs. 10,000/-, whether by way of principal or interest, was involved. Further, the defendant in evidence stated that he had paid Shs. 1,600/- interest, but that he was not given a receipt. Here I would observe that the evidence on both sides was nebulous and unsatisfactory.

The plaintiff is an Asian shoemaker at Masaka. He stated that his friend Balubhai introduced the defendant to him and the loan for Shs. 15,000/- was arranged. It is significant that Balubhai was not called as a witness, nor has the plaintiff produced any contemporary books of account to support this loan. On the face of it, it was made out of the kindness of his heart to an African businessman who was a stranger to him. Ex. F was drafted by an advocate, since deceased, and it is strange that, if there had been an agreement for the payment of interest, it is not specified in the deed.

The plaintiff states that the property covered by the mortgage was put up for sale by public auction when there was a default in payment, but that no buyer was forthcoming. The defendant does not dispute the auctioneer's fees. Although, perhaps, they should have been pleaded separately as special damages, the plaintiff, as mortgagee, would be entitled to recover the costs, charges and expenses incurred by him in relation to the mortgage security: *Re Wallis Ex-parte Lickorish* (1) ((1890) 25, Q.B.D., C.A. at p. 181).

The defendant gave evidence that he was advanced Shs. 10,000/- only. When the mortgage was read over to him by Yekoyasi Mulinda (D.W.2), the advocate's clerk, he protested but he was assured that the excess amount was only included to induce him to pay and so he signed, he being in great need of money. Mulinda, whom I regard as an impartial witness, gave supporting evidence. He says that only Shs. 10,000/- was paid by the plaintiff to the defendant in his presence. Here again there is no satisfactory evidence as to how the money was made up or counted.

The question which arises is whether this oral evidence is admissible in view of s. 91 of the Evidence Ordinance, which excludes it where the agreement, as the present mortgage, is required by law to be reduced into writing. The defendant admits that he signed Ex. F and also, after an initial denial, that he signed the receipt for Shs. 15,000/- (Ex. E). Counsel for the defendant relies on Proviso I to s. 91, which permits any facts to be proved which would invalidate a document, inter alia, for want or failure of consideration. Here can it be said that these words cover an incorrect consideration? Would it not be necessary to plead fraud? Counsel for the defendants relies on *Sah Lal Chand v. Indarjit* (2), the head note of which reads as follows:

"The Judicial Committee, approving the decision of the High Court on the point, regard it as settled law that where there has been a false acknowledgment by recital in a deed of sale of the payment by the purchaser of the consideration money, and its receipt by the vendor, it is open to the latter to prove that no consideration money was actually paid, notwithstanding anything in s. 92 of the Indian Evidence Act, 1872. That section does not enact that no statement of fact in a written instrument is to be contradicted by oral evidence.

Where the consideration money had been acknowledged to have been paid by a recital in the sale deed to that effect, Held that it was no infringement of the above section for a court to accept proof that, by a collateral arrangement between vendor and purchaser, the consideration money remained with purchaser, in his hands for the purposes and under the conditions agreed upon between them."

In my view that decision only covers the case of a collateral oral agreement where no consideration passes, not where there is an inadequate consideration. *Hukumchand v. Hiralal* (3) would seem to be more helpful to the defendant. There the deed of sale described the consideration to be Rs. 100 in ready cash, but the evidence showed that it was an old bond of Rs. 62-12-0 and Rs. 36-4-0 cash. It was held that there was no real variance between the statement in the deed and the evidence as to consideration, having regard to the fact that it is customary in India, when a bond is given wholly or partially in consideration of an existing debt, to describe the consideration as being “ready money received”. I cannot regard Shs. 15,000/- and Shs. 10,000/- as being merely different in that sense.

However, I have also been referred to *Gulamhussein Ibrahim v. Habib Rahemtulla* (4) where Bennett, J., ruled that oral evidence of the payment of a premium was admissible in a lease by virtue of proviso 2 of s. 91. He stated:

“Section 91 and its proviso embody a well recognised principle of English Law, and I can see no reason to suppose that there is any difference between the law of Uganda and the law of England on this subject. Consequently English authorities are in point, and it is well established in England that proof of a larger consideration than that stated in a written instrument is not a contradiction of the terms of that instrument; see Phipson on Evidence (9th Edn.), p. 611; *Frith v. Frith* and *Turner v. Forwood*.

In *Frith and Frith* (5) Lord Atkinson, in giving the judgment of the Privy Council, cited with approval the following passage from the judgment of the Vice-Chancellor in *Clifford v. Turrell*:

‘Rules of law may exclude parole evidence where a written instrument stands in competition with it, but it has long been settled that it is not within any rule of this nature to adduce evidence of a consideration additional to what is stated in a written instrument . . . The rule is, that where there is one consideration stated in the deed, you may prove any other consideration which existed, not in contradiction to the instrument to prove a larger consideration than that which is stated.’”

As long as the oral evidence does not go to contradict the mortgage deed I do not see why, by parity of reasoning, a lesser, as well as an additional consideration should not be proved in this way. In *Bickerton v. Walker* (7) it was held that where by a mortgage deed the plaintiffs acknowledged the receipt of £250 from B, but alleged that they had only received £91, the evidence was sufficient to enable them to redeem the mortgage for the sum which they had actually received, but that as against an assignee who had no notice that the whole £250 had not been advanced, the account must be taken on the footing of its having been advanced. Here I am satisfied on the evidence of the defendant and his witness that Shs. 10,000/- only was advanced, and that as against the plaintiff he has liquidated his liability.

For these reasons the suit is dismissed with costs.

Suit dismissed.

For the plaintiff:

D. A. Patel, Kampala

For the defendant:

Dalal & Singh, Kampala

S. H. Dalal

[1964] 1 EA 662 (SCK)

Division: Supreme Court of Kenya at Nakuru
Date of judgment: 19 May 1964
Case Number: 76 and 89/1963
Before: Trevelyn J
Sourced by: LawAfrica

[1] Hire-purchase – Motor vehicle – Judgment by creditor against hirer – Attachment of hirer’s interest in motor vehicle sought – Whether hirer’s interest attachable.

[2] Execution – Attachment – Motor vehicle subject to hire-purchase agreement – Whether hirer’s interest in car has financial value.

Editor’s Summary

The defendant having obtained judgment against the husband of the first plaintiff extracted a decree and sought to attach all the husband’s interest in a motor car belonging to the second plaintiff which was on hire to the husband under a hire-purchase agreement. The defendant intended to pay the second plaintiff the balance due under the agreement and then upon seizure and sale of the vehicle to appropriate any balance towards satisfaction of the decree. Before attachment the husband transferred his interest in the car to the first plaintiff and she and the second plaintiff filed objections to the attachment.

Held – any interest the judgment-debtor had in the car had no financial value which could be sold; accordingly there was no interest upon which execution could be levied.

Order that the attachment be raised.

Judgment

Trevelyan J: Messrs. S. P. Darbar, a firm of grocers, obtained a consent judgment against a Mr. Mehmet Fatin for a sum of money. They extracted a decree and sought to attach all the right, title and interest of Mr. Fatin in a motor car No. KCT-374 which is the property of the United Dominions (E.A.) Ltd. and on hire to him. With respect, I do not see how they ever expected to succeed in their purpose. They intended that the balance owing to the owners, calculated on the monthly instalments required, should be paid to them by cheque, the car to be seized and sold, any balance remaining to be given to Mr. Fatin. The Court Bailiff went to seize the car, was shown a document which indicated that Mr. Fatin might have no interest in it and did not seize it. The decree holders resolved to continue with their efforts and the owners and Mr. Fatin’s wife objected in manner provided by law. The matter had to go for hearing, and, by consent of the parties, the proceedings were consolidated. This judgment refers to both objections.

The reason why the decree holders stood no chance of success from the start is to be found in para. 8 of a hire-purchase agreement dated October 15, 1962, which reads:

“Should the hirer fail to pay the initial instalment of rent in full at the time when this agreement is made or to

pay any subsequent instalment or other sum payable hereunder in full within ten days after the same shall have become due or if he shall die or have a receiving order made against him or be made bankrupt or call any meeting of or make any arrangements or composition with his creditors or if the hirer being a limited company shall call any meeting of its creditors or be wound up compulsorily or go into voluntary liquidation or have a receiver of any of its assets appointed or if

the goods or any part thereof shall be seized under any execution or legal process issued against the hirer or under any distress for rent or if the hirer shall fail to observe or fulfil any term of this agreement or shall do or suffer anything whatsoever which in the owner's opinion bona fide formed upon reasonable grounds will or may have the effect of jeopardising the owner's right of property in the goods then and in each and every such case the owner may forthwith and without any notice terminate the hiring; or, alternatively by written notice (either served personally on the hirer or sent to him by post at his usual or last-known address) forthwith and for all purposes terminate the hiring and this agreement and thereafter the hirer shall no longer be in possession of the goods with the owner's consent."

Section 30 of the Civil Procedure Code provides that the court may order the execution of a decree (inter alia) by attachment and sale or by sale without attachment of any property. Section 3 of the Interpretation and General Provisions Act defines property as including any interest. Execution may therefore, be levied against an interest. But there can be no such execution unless the interest has a financial value for if it has none such it cannot be sold. The matter is referred to in two volumes of Halsbury's Laws (3rd Edn.), Vols. 16 and 19. On p. 52 of the former volume, there appears para. 79 which reads:

"Where the judgment debtor has a saleable interest in goods which are the property of some other person, and is entitled to possession of the goods, they may be seized by the sheriff, and the interest may be sold . . . If the hiring (i.e. to the debtor) is of such a nature that the debtor has no saleable interest, or if his interest has determined before seizure, the sheriff cannot legally seize . . ."

There is a footnote, (d), referring to the matter of determination by the fact of seizure which reads:

"*Jelks v. Hayward* (1905), 2 K.B. 460. Modern hire-purchase agreements entitled the owner to resume possession if the chattel is seized in execution: see title Hire Purchase."

That title is to be found in the latter volume where at p. 562 there appears para. 912 which reads:

"Seizing of hirer's interest. The property of a judgment debtor in a chattel which he has let out on hire-purchase and to which he is not entitled to possession cannot be seized under an execution; but if the judgment debtor is the hirer, his interest in the chattel so hired may be seized and sold if the chattel is in his possession and the interest is a saleable one . . . If the hiring is of such a nature that the debtor has not a saleable interest, or if his interest has determined before seizure, the sheriff cannot legally seize and sell . . ."

There is a footnote to this para. (d), which says:

"See title Execution Vol. 16, p. 52. In practice modern hire-purchase agreements provide that the owner shall be entitled to determine the hiring and resume possession of the chattels on the hirer suffering any execution to be levied on them and there is accordingly no interest for the sheriff to sell (*Jelks v. Hayward* (1905), 2 K.B. 460; *Jones Brothers (Holloway) Ltd. v. Woodhouse* (1923), 2 K.B. 117)."

Mr. Fatin's interest could not, thus, be dealt with in execution. The decree holders, however, sent a cheque to the owners (as I have indicated above). The payment was refused for the owners considered it to be bad business policy

to do otherwise. They were not bound under the agreement with their hirer to accept another hirer. They were not bound to accept more than one instalment at the time. The decree holders had no right in law to insist that they should be accepted by the owners in place of Mr. Fatin. Apart from all else the owners' rights were not restricted merely to receiving money; they had, for instance, the valuable rights given to them under the paragraph which I have set out above. They had, and they continue to have, the right to re-take possession of their property in certain circumstances. It is perhaps arguable, but it occurs to me, that in seeking to pay off the owners the decree holders want to stand in the latter's shoes rather than in the shoes of the hirer. That they cannot do.

The attachment so far as the car is concerned must be raised. But what of the issue of costs? By Ord. XXI r. 53 of the Civil Procedure (Revised) Rules 1948:

“Any person claiming to be entitled or to have a legal or equitable interest in the whole or any part of any property attached in execution of a decree may give notice in writing to the court of his objection to the attachment of such property . . .”

Fraud is alleged against Mrs. Fatin. Nonetheless the transfer to her was made – I accept the evidence about that – and has not been set aside. She is one of the class of persons who within the rule may object. It seems to me to be less than fair to both parties to make a specific finding as to whether or not fraud has been established, for, in relation to whether or not the attachment is to be raised it is unnecessary to do so – and the parties may, one day, wish to fight the matter out as a primary issue – while in relation to costs it is but one of various matters to be borne in mind as to whether the usual order should or should not be made. I am of the opinion, on a consideration of all that I understand to be necessary to a decision about it (and on the basis either that the transfer to Mrs. Fatin was or was not with an eye to creditors' future action) that Mrs. Fatin should get her costs.

In the result the objections succeed, the attachment on the vehicle concerned is raised and the owners and Mrs. Fatin must have the costs of these proceedings.

Order that the attachment be raised.

For the objectors:

B. R. Patterson-Todd, Nakuru

For the creditor:

Lawrence Long and K. J. Patel, Nukuru

Mwangi Njoki v R
[1964] 1 EA 665 (SCK)

Division:	Supreme Court of Kenya at Nakuru
Date of judgment:	21 May 1964
Case Number:	35/1964 (Nakuru).
Before:	Trevelyan J
Sourced by:	LawAfrica

[1] Criminal law – Appeal – Competence of appeal – Accused fined Shs. 100/- – Order to pay compensation also – Whether appeal competent – Criminal Procedure Code (Cap. 75) s. 348 (K).

Editor's Summary

The appellant was convicted of assault occasioning actual bodily harm and was sentenced to pay a fine of Shs. 100/- and in default of payment to three months' imprisonment. The magistrate further ordered the appellant to pay Shs. 50/- compensation with one month's imprisonment in default of payment. When the appellant appealed the respondent submitted that the appeal was not competent because under s. 348 of the Criminal Procedure Code there can be no appeal where the fine imposed does not exceed Shs. 100/- and that there is no appeal from an order of compensation.

Held –

- (i) under s. 348(2)(a) of the Criminal Procedure Code no appeal is competent (whatever the plea) where following upon conviction the court has awarded one only of the sentences of not more than one month's imprisonment, of not more than a fine of Shs. 100/- or corporal punishment, but any combination of the three sentences "therein mentioned" is appealable and it is immaterial whether or not the period of imprisonment imposed does or does not exceed a month and whether or not the fine imposed does or does not exceed one hundred shillings;
- (ii) under s. 24 of the Criminal Procedure Code payment of compensation is a punishment and, when awarded, a sentence and, as s. 348(2)(a) restricts itself to only three types of punishment mentioned in s. 24, an appeal against the order for payment of compensation was competent under s. 347.

Appeal allowed. Conviction of assault causing actual bodily harm quashed and conviction for common assault substituted.

Cases referred to in judgment:

- (1) *Anyul Ngadi v. R.* (1955), 28 K.L.R. 258.
- (2) *R. v. Meghji Nathoo* (1946), 13 E.A. C.A. 137.

Judgment

Trevelyan J: The appellant was charged with assault occasioning actual bodily harm before the Third Class Magistrate, Eldama Ravine. He pleaded not guilty, was tried, convicted and sentenced to pay a fine of Shs. 100/- (with three months' imprisonment in default of payment) and to pay Shs. 50/- compensation (with one month's imprisonment in default of payment). He has filed a memorandum of appeal against both conviction and sentence. Crown counsel has taken the point that the appeal is not competent. He says that under s. 348 of the Criminal Procedure Code there can be no appeal as the fine awarded does not exceed Shs. 100/- and there is no appeal from an order of compensation. The appeal is competent.

Section 347 of the Act provides:

- "1. Save as hereinafter provided, and except in a case to which s. 17 of the Code applies, any person convicted on a trial by any subordinate

court may appeal to the Supreme Court, and shall be so informed by the magistrate at the time when sentence is passed.

2. An appeal to the Supreme Court may be on a matter of fact as well as on a matter of law.”

Section 348 of the code provides:

- “1. No appeal shall be allowed in the case of any accused person who has pleaded guilty and has been convicted on such plea by a subordinate court, except as the extent or legality of the sentence.
2. No appeal shall be allowed
 - (a) in cases in which a subordinate court has passed a sentence of imprisonment not exceeding one month only, or of a fine not exceeding one hundred shillings only, or of corporal punishment only;
 - (b) from a sentence of imprisonment passed by a subordinate court in default of payment of a fine, when no substantive sentence of imprisonment has also been passed; Provided that an appeal may be brought against any sentence referred to in this subsection by which any two or more punishments therein mentioned are combined, but no sentence which would not otherwise be liable to appeal shall be appealable merely on the ground that the person convicted is ordered to find security to keep the peace.”

It is, then, s. 347 which gives the right of appeal and s. 348 which restricts its operation. But what is the extent of the restrictions provided for in s. 348 (2) where the accused person has pleaded not guilty? The expression “No appeal shall be allowed” must mean “No appeal is competent”, so that para. (a) provides that no appeal is competent (whatever the plea) where following upon a conviction the court has awarded one only of the sentences of not more than one month’s imprisonment, of not more than a fine of Shs. 100/- or corporal punishment. The threefold use of the word “only” and the twofold use of the word “or” would, I suggest, leave no room for doubting that this must be so. But if room for doubt does exist, the first part of the proviso emphasises that an appeal may be brought against any sentence referred to in the subsection by which any two or more punishments “therein mentioned” are combined. It is true, as Crown counsel has pointed out, that a sentence of imprisonment in default of payment of a fine is not a sentence by which two or more punishments are combined within the meaning of the subsection, but I am by no means satisfied (though I prefer not to decide the point for it has not been argued and it is not necessary to the decision I must make) that a sentence of a fine with a sentence of imprisonment in default of its payment is a fine “only”.

Throughout the Criminal Procedure Code and the Penal Code, the expression “punishment” appears to refer to sentences which may be awarded and the expression “sentence” to where such punishments have in fact been awarded. Section 24 of the latter code provides that:

“The following punishments may be inflicted by a court – (a) death; (b) imprisonment; (c) detention under the Detention Camps Ordinance or any Ordinance amending or replacing the same; (d) corporal punishment; (e) fine; (f) forfeiture; (g) payment of compensation; (h) finding security to keep the peace and be of good behaviour; (i) any other punishment provided by this Code or by any other Ordinance.”

Each of the nine items is, then, a punishment and when awarded, a sentence. Section 348(2)(a) restricts itself to only three of those punishments, namely (b) imprisonment, (d) corporal punishment and (e) fine. It leaves untouched (subject to subsection (1) where it is applicable) the right to appeal given by

s. 347. Accordingly, sentences to undergo the other punishments mentioned in s. 24 (other than death which is provided for in s. 347) may be appealed. Moreover on the clear reading of sub-s. 2 (a) any combination of the three sentences “therein mentioned” is appealable and in my view it is immaterial whether or not the period of imprisonment imposed does not exceed a month and whether or not the fine imposed does or does not exceed Shs. 100/-. (Though it is unnecessary to my decision I would suggest that the second part of the proviso refers to the provisions of s. 33 of the Penal Code.)

Hooper, J. had, in *Anyul Ngadi and Another v. R.* (1), to consider s. 348 in relation to appellants who had pleaded guilty before the trial magistrate. With respect I agree with everything he had to say about it.

With regard to the merits of the appeal, Crown counsel points out, and I agree with him, that “harm” has not been established, for the doctor was not called, and there is no admissible evidence about it. There was, however, clear evidence that the appellant was guilty of common assault.

As for sentence, the fine (with its sanction in default) imposed was not excessive even for common assault. Nor was the amount of compensation, awarded excessive but the sentence in default of its payment should not have been awarded: Circular to Magistrate No. 2 of 1959.

There is one final matter. The record states: “Accused in person affirmed states.” It would appear, therefore, that the magistrate complied with the provisions of s. 211 of the Criminal Procedure Code, but it is better where it is done for the record to contain some such expression as: “C.P. Code s. 211 complied with.” There was no injustice in any event: *R. v. Meghji Nathoo* (2).

The appeal succeeds to the extent that I substitute a conviction for common assault contra s. 250 of the Penal Code for the conviction entered for it is minor and cognate to that charged and I set aside the sentence in default of payment of compensation. Subject thereto the appeal fails and is dismissed.

Appeal allowed. Conviction of assault causing actual bodily harm quashed and conviction of common assault substituted.

The appellant did not appear and was not represented.

For the respondent:

The Attorney General, Kenya

V. S. Dhir (Crown Counsel, Kenya)

Evan Maina v Joseph Chibo
[1964] 1 EA 668 (SCK)

Division:	Supreme Court of Kenya at Nairobi
Date of judgment:	17 September 1964
Case Number:	207/1964
Before:	Chanan Singh J
Sourced by:	LawAfrica

[1] *Trade union – Libel – Action against trade union official – Libel published by shop steward – Libel upon fellow employee – Whether action against trade union official competent – Trade Unions Act (Cap. 233) s. 24 (1) (K.).*

Editor’s Summary

The plaintiff and the defendant were both employees of the same company. The plaintiff’s duties included supervision of the staff and the defendant was a shop steward at the employers’ establishment and a trade union official. The defendant wrote to the area manager of the company a letter concerning the plaintiff which he considered defamatory in relation to his employment and for which he brought an action claiming damages for libel. As the action was undefended, the court considered whether the action was competent in view of s. 24 (1) of the Trade Unions Act which provides that “a suit against a registered trade union or against any member or official thereof on behalf of themselves and all other members of such trade union in respect of any tortious act alleged to have been committed by or on behalf of such trade union shall not be entertained by any court”.

Held –

- (i) s. 24 (1) of the Trade Unions Act provides that a suit cannot be brought against a trade union itself or against any of its members or officials, so as to make the trade union funds liable for the satisfaction of any judgment;
- (ii) s. 24 (1) of the Act does not prevent anyone bringing a suit against an official of a trade union in his personal capacity; accordingly the action against the defendant was competent.

Judgment for the plaintiff for Shs. 1,000/- damages.

Cases referred to in judgment:

- (1) *Bussy v. The Amalgamated Society of Railway Servants and Bell* (1908), 24 T.L.R. 437.
- (2) *Vacher v. London Society of Compositors*, [1913] A.C. 107.

Judgment

Chanan Singh J: The plaintiff is the Deputy Station Manager employed by the N.A.S. Airport Services Limited at Embakasi Airport. His duties include the supervision of staff. The defendant is also employed by the same company at the airport. He takes interest in trade union matters and is the shop steward at the establishment of his employers on behalf of his union, the Domestic and Hotel Workers’ Union. On February 5, 1964, he wrote the following communication to the Area Manager of the company:

“The Area Manager, N.A.S.

5/2/64

What was said by the employees.

The meeting which was held on February 2, 1964 – All the employees said that they don’t want Maina, and they are giving him a notice of two weeks which is 14 days, and if not so, every employee will walk out of duty.

The reason for this notice is as follows.

1. On January 11, 1964 he said that everybody in N.A.S. is stupid and they all do not know their work.
2. Maina said that anybody earning Shs. 160/- should not get any increment.
3. Maina said that he was employed to stop any complaint we may ask from our Manager. Furthermore he deducted the salary of some of employees because they do not know English.

Copy:

1. Domestic & Hotel Workers' Union.
2. Kenya Federation of Labour.
3. Area Manager.

By the Order of N.A.S. Works Committee and Shop Steward

(Sgnd. Joseph)."

The plaintiff has brought this action alleging that the communication sent by the defendant to his employers constitutes a libel on him in relation to his employment. The defendant was duly served but he did not enter appearance and took no interest or part in the proceedings, apart perhaps from asking the General Secretary of his union to write to the deputy registrar of this court. In reply to the letter from the general secretary the deputy registrar informed him that the defendant was at liberty to make an application to the court in the usual form. Nothing further happened and the case came up for hearing ex parte on July 10, 1964. The plaintiff gave evidence that he was shocked and embarrassed by the defendant's communication and that he could lose his job as a result of it. He added:

"The writer of the letter meant that I was not doing my job properly and that I was unscrupulous. It reflects on my efficiency as a supervisor. The threat of a strike meant that I was not fit to be associated with the N.A.S."

Mr. Otto Erich Tauber, the Managing Director (who was also the Area Manager) of N.A.S. Airport Services Limited, gave evidence in support of the plaintiff. He stated inter alia:

"I was worried by the letter because I knew the pressure which a man like Joseph" (meaning Joseph Chibo, the defendant) "can exercise is great and in the interests of peace you would sometimes sacrifice a good man. After I had considered all the facts carefully I decided to be firm in this particular case. I also went to the Ministry of Labour and showed them the letter. The letter was meant to discredit him, to show that he was unable to do his duties, to control staff. Plaintiff never said to me that anybody earning Shs. 160/- should not get increments. I am responsible for the granting of increments. Employees can come direct to me. They usually come direct to me. If the supervisor suggested that a certain man was good and worthy of an increment, this would also interest me. I have never heard of any complaint being stopped from reaching me. But he certainly has to deal with matters which I cannot handle. Plaintiff can deal with minor complaints because, as the managing director, I do not have the time to deal with petty complaints. Plaintiff is not authorised to make deductions from wages. No deductions have ever been made and this can be proved by producing our wages book. I realised when I read the letter that those things were not true and I decided to stand up against it. I called Maina into my office and I showed him the letter. He was also very worried."

Mr. Tauber agreed that the letter from the defendant was written to him as

from the trade union, and he understood it as coming to him from the defendant as the shop steward of the union.

Since the defendant has done nothing to defend the plaintiff's claim it is possible that he believes that no such claim can be made against a trade union official. It is necessary, therefore, to examine the legal position, if only briefly. Section 24 (1) of the Trade Unions Act (Cap. 233) [K.] reads as follows:

"A suit against a registered trade union or against any member or official thereof on behalf of themselves and all other members of such trade union in respect of any tortious act alleged to have been committed by or on behalf of such trade union shall not be entertained by any court."

What is alleged against the defendant is a libel, which is a tortious act. The section of the law which I have just quoted does seem at first sight to suggest that no official of the trade union can be sued for a tort such as a libel. There is, however, ample authority to the contrary. In *Bussy v. The Amalgamated Society of Railway Servants and Bell* (1), a suit was brought for malicious prosecution (which is also a tort) against a trade union and its general secretary, Mr. Richard Bell. The learned judge ruled that the Society could not be sued but went on to say this:

"Mr. Bell, by his defence, claims that he, being an official of a trade union, is personally entitled to the same immunity as is now to be enjoyed by his employers. I cannot think that this is the meaning of the statute. In my opinion the officials or members of the trade union are not liable to be sued "on behalf of themselves and all other members of the trade union" in the sense that they cannot be sued so as to make the trade union as such, and the funds of it, liable for their acts. The words of the section are not explicit; but unless they are to be understood as I think, it would follow that not only a trade union, but all its officials, in numbers unlimited, might, without liability to make reparation in damages, be guilty of any and every wrong known to the law, such as slander, libel, assault, wounding, false imprisonment, and even the wrong here complained of. The statutes may possibly be read to intend all this; but I hesitate to believe, and I am not convinced, that Parliament can have meant that no one committing any of these wrongs should be liable to make reparation if he were privileged to occupy a post as official of a trade union and could satisfy a jury that he acted on their behalf alone. The immunity claimed for Mr. Bell appears inadmissible . . ."

The same point came up for consideration in a later case, *Vacher v. London Society of Compositors* (2). This was a case of libel contained in a publication of the defendant union. Lord Moulton stated ([1913] A.C. at pp. 130 and 131):

"I am further of opinion that too much has been made of the supposed gravity of the consequences of the enactment. It will be seen that it does not affect the personal liability of any individual. Trade unions, just like all other associations, must act through agents, and it is a fundamental principle of English law that no tortfeasor can excuse himself from the consequences of his acts by setting up that he was acting only as the agent of another. All that the section takes away is the power of proceeding against the association or making its corporate funds liable."

These two decisions are based on s. 4 of the United Kingdom Trade Disputes Act, 1906, which in all essentials is the same as our s. 24 (1) quoted above. It is clear, therefore, that there is nothing to prevent anyone bringing a suit against an official of a trade union in his official capacity. The law goes no

further than saying that a suit cannot be brought against the trade union itself or against any of its members or officials, so as to make the trade union funds liable for the satisfaction of any judgment. In my opinion, therefore, the case has been brought in accordance with law. The only question is whether the letter complained constitutes a libel on the plaintiff. It is quite clear that the letter did the plaintiff no actual harm apart from causing him some worry, which was natural in the circumstances. The Area Manager of the employing company knew the plaintiff and his work, and appreciated his position. He decided to take no action. Another person in his position might have panicked and have taken the plaintiff to task for not being able to control staff or might have terminated his services with a view to avoiding strike by workers. The plaintiff denied the first allegation in Ex. 1, namely, that he called the employers of his company “stupid”, or that he alleged that they did not know their work. He also stated, and he was supported in this by the Area Manager, that he never even suggested that persons earning Shs. 160/- should not get an increment. There is also evidence that he never stopped any complaint from any employee from reaching the Area Manager.

There is no evidence in support of the allegations because, as I have stated, the defendant did not appear at the hearing. The only evidence before the court, therefore, is that of the plaintiff and his witness, Mr. Tauber. Since all the three allegations on the evidence before me are false, I must conclude that they were maliciously or recklessly made. Unsupported by any evidence as these allegations are, they, in my opinion, constitute a libel on the plaintiff in relation to his work. Copies of the letter were sent by the writer to the head office of the Domestic and Hotel Workers’ Union and to the Kenya Federation of Labour. This constituted additional publicity for the libel. If the letter had been meant as a request made to the Area Manager for investigation, there was at that stage no need to send copies to the union headquarters and to the Kenya Federation of Labour. Since copies were sent it is clear that the writer was serious about the allegations and was convinced in his own mind that they were true and required no investigation. This is also clear from the introductory paragraph to the letter which conveys a decision to the effect that the plaintiff be removed from his post within fourteen days.

I, therefore, find the libel proved. The assessment of damages is a more difficult matter. The plaintiff has given no evidence of any actual loss to him. If, as a result of the communication, he has lost his job, some basis for the assessment of damages would have been there. As it is, his employer is satisfied with his work and is convinced that the allegations made against him were completely false. I think, therefore, he is entitled to no more than a small sum as damages, but a sum which will reasonably vindicate his position and will be some compensation for the embarrassment and loss of reputation. Accordingly, I award him Shs. 1,000/-. The plaintiff will also have the costs of the action on the Supreme Court scale.

Judgment for the plaintiff for Shs. 1,000/- damages.

For the plaintiff:

A. H. Malik & Co., Nairobi

M.Z.A. Malik

The defendant did not appear and was not represented.

Omar Abdulla Awadh Maalim v R
[1964] 1 EA 672 (SCK)

Division: Supreme Court of Kenya at Nairobi
Date of judgment: 23 July 1964
Case Number: 429/1964
Before: Sir John Ainley CJ and Chanan Singh J
Sourced by: LawAfrica

[1] Criminal law – Assisting concealment of stolen property – Suspected thieves and stolen property with accused in accused's house – Door locked – Request for admission by police ignored – No evidence of act of assistance – Possession as element of offence.

[2] Criminal law – Trial – Recall of witness – Prosecution case closed – Submission of no case to answer – Witness recalled to identify stolen property – Witness recalled in interests of justice – Whether recall of witness proper – Right of appellate court to consider whether recall necessary.

Editor's Summary

The appellant was convicted of assisting in the concealment of stolen property contrary to s. 322 (3) of the Penal Code. The evidence which was accepted by the magistrate was that on September 10, 1963, a number of radio sets were stolen from a shop which had been broken into; that two persons who were suspected of having stolen the radio sets went with certain radio sets to the appellant's house and that soon after the police arrived and when a police officer knocked on the door of the house, saying that he was a police officer, there was no response from within; that after half an hour another police officer knocked on the door, saying that he was a police officer, but there was still no reply; and that a police constable then climbed the door and saw the appellant and the two other persons sitting on the floor, bunched together with their heads down and their arms over their heads; that the constable shouted to them and the appellant then opened the door, which had been locked or bolted, and that some of the stolen radio sets were found in the house. At the trial the manager of the shop gave evidence that he had checked the contents of the shop against the stock book and had found that radio sets bearing certain numbers were missing, and that he had made out a list of these. The manager's evidence showed that two at least of the sets found in the appellant's house had been stolen from the shop. At the conclusion of the prosecution case, counsel for the appellant submitted that he had no case to answer and said inter alia that he objected to the list of radios to which the manager had referred. The prosecutor then obtained an adjournment to seek advice from the Law Officers. At the adjourned hearing Crown counsel appeared and submitted that the evidence of the manager as to the serial numbers of the radios unsupported by original documents was not admissible and he suggested the manager's recall by the court under s. 150 of the Criminal Procedure Code. This proposal was strenuously resisted by the defence who relied on s. 210 of the Criminal Procedure Code. The magistrate decided to recall the manager and in his ruling stated that the omission by the prosecutor to adduce relevant evidence could have been due to a misapprehension of the law of evidence and that it would not be proper for the administration of justice to be prejudiced by a technical mistake. The manager was recalled and produced his stock book from which he made it clear which sets had been stolen from his shop and that certain of the sets found in the appellant's house were stolen. On appeal it was argued that there was no evidence that the appellant had taken possession of the radio sets or had achieved joint possession of them, and that there must be some act of assistance to conceal the stolen property and that there was none on the part of the appellant.

Held –

- (i) possession is not a necessary element in the offence of assisting in the concealment of stolen property;
- (ii) although the appellant made no move and performed no act after the arrival of the police, he behaved in a manner calculated to assist in maintaining the privacy and secrecy previously created and thereby embarked upon a course of conduct directed to aid in the concealment both of the two men and of the stolen radio sets;
- (iii) Under s. 150 of the Criminal Procedure Code it is the duty of the court *inter alia* to recall and re-examine any person, at any stage of a trial, if his further evidence appears essential to arriving at a just decision; however, an appellate court is not thus bound to uphold as correct every recall or examination merely because the judge in the court below has said that the recall was essential to a just decision of the case;
- (iv) an appellate court can inquire whether the examination of a witness under s. 150, *ibid.*, was indeed essential to a just decision, and may inquire whether the examination was or was not calculated to do injustice to the accused and if injustice was in fact done to an accused by the examination or if by examination the defence was put to an unfair disadvantage, then the examination has militated against a just decision of the case however certain the court was of the need to conduct the examination;
- (v) it was essential to a just decision of the case that the identity of the radio sets should be placed beyond all doubt or cavil and that the court should know the truth; accordingly, the magistrate acted quite properly in recalling the witness and in accordance with his powers and duty;
- (vi) no injustice, embarrassment or unfairness resulted to the appellant from the course the magistrate took and, even if the magistrate was guilty of some irregularity, it could not have been fatal to the conviction.

Appeal dismissed.

Cases referred to in judgment:

- (1) *Manyoki and Others v. R.* (1958), E.A. 495 (C.A.).
- (2) *R. v. Dorra Harris*, [1927] 2 K.B. 587.
- (3) *R. v. Liddle*, 21 Cr. App. R. 3.
- (4) *R. v. McMahon*, 24 Cr. App. R. 95.
- (5) *McKenna v. R.*, 40 Cr. App. R. 65.

Judgment

Sir John Ainley CJ, read the following judgment of the court: In this case the appellant was charged with shop breaking and theft contrary to s. 306 (a) of the Penal Code.

He was convicted of an offence contrary to s. 322 (3) of the Penal Code, and sentenced to eighteen months' imprisonment. Subsection (3) of s. 322 reads:

“Any person who assists in concealing or disposing of or making away with any property which he knows or has reason to believe to have been stolen or obtained in any way whatsoever under circumstances which amounts to felony, is guilty of a misdemeanour and is liable to imprisonment for three years.”

Now in the early morning of September 10, last year a shop known as the African Radio House, situated in Nairobi, was broken into and a number of radio sets were stolen. Upon evidence which the learned senior resident magistrate accepted, and, subject to a question touching the re-call of a witness,

quite properly accepted, two men who were accused in the case but who absconded in the course of the trial, were in possession of at least two of the stolen sets by the afternoon of September 10.

On evidence which the magistrate reasonably believed, these two men, whom we will call the third and fourth accused, hired a taxi in Pumwani, at about 3 p.m. and drove to the appellant's house in Eastleigh, picking up on the way certain luggage which included a number of radio sets. It is we think perfectly obvious that some at any rate of these radio sets were those stolen from the African Radio House. When the taxi arrived at the appellant's house, the appellant was at the door of his house. The third and fourth accused, with their loads entered the house. The time is a little uncertain. We judge that the third and fourth accused arrived probably before 4 p.m. The matter is however of little moment. Pausing here we would say that there is no certainty that the arrival was pre-arranged. We add however that it is our belief, as it was the belief of the learned magistrate, that the third and fourth accused were at that time knowingly in possession of stolen radio sets. These two accused have not been convicted either of receiving or of stealing. A *nolle prosequi* has been entered in their cases. But on the facts before the court below it would be preverse to hold that the third and fourth accused were in innocent possession of the stolen radio sets. To continue, the appellant when third and fourth accused arrived may, possibly, have been in ignorance of what was being brought to his house. However, at 4.20 p.m. the police came to this house. By this time it is clear some understanding of the visit of the third and fourth accused must have been gained by the appellant. Chief Inspector James knocked on the door of the house, saying that he was a police officer. There was no response from within. Sub-Inspector Zacharia remained on guard while more police were summoned and thirty minutes later an Assistant Superintendent of Police, Mr. Solly, came to the house. He knocked on the door saying that he was a police officer. There was no reply. There was then a pause of about ten minutes. A police constable then climbed the door and looked through what appears to have been a fanlight above it.

The appellant and the third and fourth accused were sitting on the floor, bunched together with their heads down and their arms over their heads. The constable shouted to them and the appellant then opened the door, which had been locked or bolted. The stolen radio sets were in the room.

Now we think it clear that the appellant, before the police knocked for the first time must have known that the third and fourth accused had brought stolen property to his house. It is not realistic to suppose that the appellant's silence, and his refusal to reveal his own presence and the presence of the third and fourth accused at the first knock, was due to a flash of intuition. The evidence reasonably believed by the learned magistrate strongly indicated that the appellant had learned in some way that he had to do with those who possessed stolen property, and had brought it to his house. Did he then assist in the concealment of that property? It is argued first that there is no evidence that the appellant had taken possession of the property or that he had achieved joint possession of it. That is perfectly true, and the learned magistrate found as much, but we do not think that possession is a necessary element in the offence of assisting in the concealment of stolen property. If it were sub-s. (3) of s. 322 would be a well nigh meaningless addition to that section. But it is argued with greater force that there must be some act of assistance, and that here there was no act on the part of the appellant. He did not show the other two men where to hide the goods, he did not push the goods under a sofa or anything of that sort. Simply he kept quiet.

This argument is not without weight but as it seems to us the appellant embarked upon a course of conduct directed to aid in the concealment both

of the two men and of the stolen goods. Clearly if it had been proved, as admittedly it was not proved, that on seeing the approach of the police the appellant locked the door of his house, there would have been no question but that he assisted in the concealment of the goods, and harboured the third and fourth accused. We agree that the case is not as self evident as that. Yet the appellant did fasten his door, or permit it to be fastened. He did the very obviously take steps to ensure the privacy of his visitors and to protect the goods from the observation of other visitors. True, he may have done that before he knew that the goods were stolen. But when the police came, though it can be urged that he made no move and performed no act, he yet behaved in a manner calculated to assist in maintaining the privacy and secrecy previously created. For about forty minutes he kept his door barred against the police, knowing that he had stolen goods in his house. He maintained silence clearly to give the impression that no one was in the house. He cowered down with the others in an admittedly futile and possibly panic stricken attempt to conceal his presence in the house. Had the police been less persistent they might well have gained the impression that there was no one in the house and might have gone away without discovering the goods. It was clearly the hope of the appellant that they would do so, and he very obviously did behave in a manner calculated to deflect the police from the discovery of the stolen goods.

Subject to the question which we will now discuss we think that the appellant was properly convicted of an offence contrary to s. 322 (3) of the Penal Code.

The question to which we have referred is as follows. In order to prove that the radio sets found in the appellant's house under the circumstances just described were in fact radio sets which had been stolen from the African Radio House, the prosecution called the manager of that establishment. He swore that he had checked the contents of the shop against the stock book and had found that certain radio sets bearing certain numbers were missing. He had apparently made out a list of the sets he declared to be missing, and he seems to have refreshed his memory from a copy of that list. Without any question his evidence, so far as it went, showed that two at least of the sets found in the appellant's house had been stolen from his shop. He was cross-examined at some length by learned counsel for the appellant, but no submission was made that his evidence was inadmissible. At the conclusion of the Crown case submissions of no case to answer were made by counsel for the appellant, and by counsel for other of the accused. Counsel for the appellant, said, inter alia, that he objected to the list of radios. He said that the best evidence, that is to say the stock book had not been produced. Counsel for other of the accused adopted the same argument and added to it. The prosecutor now sought an adjournment to obtain advice from the Law Officers and this was granted. On a later date learned Crown counsel appeared. He said that as he saw it the evidence of the manager as to the serial numbers of the exhibits unsupported by original documents was not admissible and he suggested the manager's re-call by the court under s. 150 of the Criminal Procedure Code. This proposal was strenuously resisted by the defence who relied on the provisions of s. 210 of the Criminal Procedure Code.

The learned senior resident magistrate decided to re-call the manager. He said:

"The court attributes the omission by the prosecutor to adduce relevant evidence to have been due to a misapprehension of the law of evidence and it is considered that it would not be proper that the interests of justice be prejudiced for what can be regarded as a technical mistake."

The manager was then recalled and produced his stock book. With the aid of his stock book he made it clear which radio sets had been stolen from his shop. It was made clear that certain of the sets found in the appellant's house were

stolen sets. Further submissions of “no case to answer” were now made but the court ruled that all accused now had a case to answer. The appellant and his co-accused gave evidence and called witnesses. Was the learned magistrate in error when he re-called the manager? Section 150 of the Criminal Procedure Code reads:

“Any court may, at any stage of any inquiry, trial or other proceeding under this Code, summon or call any person as a witness, or examine any person in attendance though not summoned as a witness, or recall and re-examine any person already examined, and the court shall summon and examine or recall and re-examine any such person if his evidence appears to it essential to the just decision of the case.”

In East Africa much learning in many conflicting cases has been expended on the interpretation of this section, and of similar section in the Procedure Codes of other East African territories. It is however a remarkably simple section, and means no doubt precisely what it says. It is the duty of the court, inter alia, to re-call and re-examine any person, at any stage of a trial, if his further evidence appears to it essential to a just decision of the case. This does not, we apprehend, mean that an appellate court is bound to uphold as correct every re-call or examination merely because the judge of the court below has said “It appears to me that to call (or re-call) so and so is essential to a just decision of the case.” Plainly an appellate court can inquire whether the examination of a witness under the section was indeed essential to that end, and may inquire whether the examination was or was not calculated to do injustice to the accused. If injustice is in fact done to an accused by the examination, if by the examination the defence is put to an unfair disadvantage, then clearly the examination has militated against a just decision of the case however certain the court was of the need to conduct the examination. Some distinction was made by the Court of Appeal for Eastern Africa in *Manyoki and Others v. R.* (1) between the discretion of a judge in England and the duty of a judge in East Africa. With respect, this distinction does of course exist. It may be possible however to over-emphasise it. Before the judge in England exercises his discretion, and before the judge in East Africa conceives it to be his duty under the section to call or re-call, a witness, each must follow much the same line of thought, and must ask himself the same question—will this be in the interests of justice? In England the Court of Criminal Appeal in the well known case of *R. v. Dora Harris* (2) appear to lay down a somewhat rigid rule touching the exercise of the discretion when the case for the defence has closed. Where the defence has closed the practice, it was said, should be limited to the case where a matter arises ex improviso, which no ingenuity can foresee, otherwise, it was said, injustice would ensue. We are not here, of course faced with a case where the defence had closed, and *Harris’s* case (2) is not fully in point. We observe however that though there seems no warrant for saying that the rule in *Harris’s* case (2) must be adhered to by courts in Kenya as if it had been written into s. 150, it is apparent that the calling of witnesses after the close of the defence case can involve many dangers, and we think that magistrates in this country when reading *Harris’s* case (2) would do well to study the facts of the case, and without regarding the judgment as a piece of legislation applicable to Kenya, to note what seems to be the true ratio decidendi which appears ([1927] 2 K.B. at p. 596):

“In the circumstances, without laying down that in no case an additional witness be called by the judge at the close of the trial after the case for the defence has been closed, we are of the opinion that in this particular case the course that was adopted was irregular, and was calculated to do injustice to the appellant Harris.”

We emphasise the last ten words. There is of course a further reason why *Harris's* case (2) and the English cases which followed, *R. v. Liddle* (3); *R. v. McMahon* (4) are of little value in the present case. This case is an instance of the re-call of a witness. There can be an obvious distinction between calling a witness whom neither side has seen fit to call and whose testimony may come as a complete surprise to the defence, and the re-call of a witness the purport of whose evidence is well known to both sides.

In this case the manager had sworn that certain radio sets were missing. He swore that he had checked the stock, and he indicated how he had checked the stock. The submission made at the end of the prosecution case, really was that the manager should not have been heard to say what he did, a submission which should, we think, have been made when the witness was giving evidence in chief. Had it occurred to the court that the non-production of the stock book was of the vital importance which it was later said to be the court would, of course, have adjourned for the few minutes necessary for its production. All he did in fact was to permit the book to be produced after the close of the prosecution's case. We cannot see that the slightest injustice, embarrassment or unfairness resulted from the course he took and even if the court was guilty of some irregularity we do not think that such irregularity would be fatal to the conviction.

However, we are of the opinion that the learned magistrate acted quite properly and in accordance with his powers and duty.

In the circumstances it was clearly essential to a just decision of this case that the identity of the wireless sets should be placed beyond all doubt or cavil, and that the court should know what the truth was. In England where as the Court of Appeal for Eastern Africa has pointed out the matter is one of discretion, and not of duty, it has long been recognised that the court has a complete discretion whether a witness shall be recalled and may exercise that power after the prosecution case has closed, and after a submission of no case to answer has been made, subject always to the question whether an injustice may occur because of the re-call. We refer to the case of *McKenna v. R.* (5).

Here in Kenya the court, in view of s. 150, had we think, not only a power, but a duty to re-call the manager. We are aware that s. 210 of the Criminal Procedure Code gives an order, but so does s. 150. We do not say that in all cases it becomes the duty of the court to leap to the aid of the prosecutors or to adopt the powers of a commission of inquiry. Each case must depend upon its own facts and circumstances. We have no doubt however that in this particular case the court below properly declined to act under s. 210 until the identity of these goods had been cleared up by a further examination of the manager.

For the above reasons we think that the conviction of the appellant was proper and just and we dismiss his appeal against conviction.

We do not consider that the sentence was excessive. The appeal is dismissed.

Appeal dismissed.

For the appellant:

D. V. Kapila, Nairobi

For the respondent:

The Attorney General, Kenya

K. C. Brookes (Deputy Public Prosecutor, Kenya)

J H Singh and another v Habib Punja and Sons Ltd
[1964] 1 EA 678 (HCT)

Division: High Court of Tanganyika at Dar-es-Salaam
Date of judgment: 13 April 1964
Case Number: 1/1964
Before: Williams Ag J
Sourced by: LawAfrica

[1] Rent restriction – Sub-tenancy – Sub-tenant deemed to become tenant – Premises sublet by tenant for six months – Board’s consent not obtained but oral consent given by landlord – Sub – tenant in occupation of premises after expiry of six months – Application to Board to declare sub – tenant as tenant – Declaration by Board purporting to act under Rent Restriction Act, 1962, s. 31 (1) and (5) (T.).

Editor’s Summary

When the first appellant who was a tenant of premises belonging to the respondent, left for India on six months’ holiday he wrote to the respondent that in his absence the flat would be occupied and the rent would be paid by the second appellant. For six months thereafter the second appellant occupied the flat and paid the rent for which receipts were issued by the respondent in the name of the first appellant. When after six months the flat was still occupied by the second appellant, the respondent refused to give receipts in the name of the first appellant and applied to the Rent Restriction Board, Dar-es-Salaam, for an order declaring the second appellant to be the lawful tenant of the flat. The Board, purporting to act under s. 31 (1) and (5) of the Rent Restriction Act, 1962, made an order that the second appellant was the tenant of the respondent and that the first appellant was in unlawful occupation of the flat. From this decision an appeal was brought on the ground that, as none of the requirements of s. 31 (1) had been complied with, the respondent’s application should have been dismissed. At the hearing it was submitted that the second appellant was at no time a sub-tenant according to s. 31, as the written consent of the respondent and of the Board had not been obtained.

Held –

- (i) sub-section (5) of s. 31 of the Rent Restriction Act, 1962, merely states that where a tenant has failed to repossess the premises on expiry of the period of six months, the sub-tenant is deemed to be the tenant of the landlord;
- (ii) sub-section (5) expressly refers to previous sub-sections of s. 31 and the sub-sections must, therefore, be read as a whole; accordingly sub-section (5) is only applicable where the conditions set out in s. 31 (1) have all been complied with;
- (iii) there was a legal subsisting tenancy between the respondent and the first appellant which had existed all the time; there was also a legal subsisting sub-tenancy between the first appellant and the second appellant which was terminated by mutual agreement when the flat was handed over to

the first appellant by the second appellant;

- (iv) there was no sub-tenancy pursuant to s. 31, as there was no written but only a verbal consent from the landlord; accordingly the landlord was not entitled to claim any rights under s. 31 (5) and his application was wholly misconceived.

Appeal allowed.

Judgment

Williams Ag J: This is an appeal from the decision and order of the Dar-es-Salaam Rent Restriction Board declaring the second appellant, Dr. D. K. Mangat, as tenant of premises owned by the respondent/landlord. The order purported to be made under the provisions of ss. 31 (1) and (5) of the Rent Restriction Act. In his application to the Board the respondent/landlord set out the facts on which he based his claim in para. 10 of the prescribed formal application as follows:

“Our tenant, Dr. J. H. Singh, left for India on six months’ holiday in February this year, and with our consent sub-let the suit premises to Dr. D. K. Mangat, who has been in occupation ever since. The period of six months has expired and the sub-tenant has not re-entered into personal occupation of the premises. We therefore pray that the sub-tenant, who is now in occupation, be declared as a lawful tenant and responsible for payment of rents and other obligations in law. Copy of the letter dated January 31, 1963, from Dr. Singh is attached as an exhibit.”

This application purported to have been made under ss. 7 (1) and 31 (1) and (5) of the Rent Restriction Act, 1962.

The undisputed facts may be stated briefly. On January 31, 1963, a letter was written by the first appellant, Dr. Singh, to his landlord, the respondent, stating inter alia that he was leaving for India for a period of about six months. He went on to say that in his absence Dr. Mangat, who appears to be his partner, had accepted to housewarm the flat and to pay the rent direct to the landlord. There is no evidence of any written acceptance to this letter of request, but it is clear that the landlord in fact had no objection and indeed, as he concedes in his application set out supra, he consented. For a period of six months after the departure of Dr. Singh the rent was paid to him every month by Dr. Mangat, and receipts were issued by the landlord in the name of Dr. Singh. After August, 1963, the landlord refused to give receipts in the name of Dr. Singh. No extension of time was ever requested by the first appellant on behalf of the second.

The following order was made by the Board: –

- “(1) The Board finds that:
 - (a) Dr. Mangat is the tenant of the applicant (landlord) from the date of expiry of the six months’ period referred to in sub-para. (1) of s. 31 of the Rent Restriction Act, 1962, namely from August 1, 1963.
 - (b) Dr. Singh is in unlawful occupation of the suit premises.
- (2) The first respondent (Dr. Singh) to pay to the applicants the cost of this case assessed at Shs. 240/- plus the Board fees of Shs. 25/-.”

Eight grounds of appeal have been filed for the appellants by counsel, who has concerned himself mainly with grounds 2 and 5. These grounds as set out in the memorandum of appeal are:

- “2. The Board should have seen that none of the requirements of s. 31 (1) were complied with and hence that section did not apply to this case.”
- “5. The decision of the Board is illegal and against the provisions of the Act in as much as the same is the decision of the chairman alone and not of the whole Board.”

Counsel for the appellants argued that the Board has not considered the provisions of s. 31 in their right perspective, otherwise the respondent/landlord’s application would have been dismissed. He submitted

that Dr. Mangat was

at no time a sub-tenant according to the provisions of the section, as the necessary written consent of the landlord and the consent of the Board had not been obtained.

Counsel for the landlord/respondent conceded that no written consent had been given by the landlord but argued that the lack of written consent was not in itself a material defect, and that it should not be held against the landlord.

I am unable to understand why the provisions of s. 7(1)(i) were relied upon. The section reads as follows:

- “7.(1) A Board shall, in relation to the area for which it is established, have power to do all things which it is required or empowered to do by or under the provisions of this Act, and without prejudice to the generality of the foregoing shall have power –
- (i) to approve lettings, sub-lettings, or assignments of premises and any prospective tenants, sub-tenants, or assignees;”

It is clear that this provision applies *inter alia* to approval of lettings and sub-lettings. Approval must surely pre-suppose mutual agreement between the parties, which in the instant case did not exist at the date of submission of the application to the Board by the landlord/respondent.

Under the Act it is clear that sub-letting by the tenant is governed by s. 30, which reads:

- “30. Notwithstanding the absence of any covenant against the assigning or sub-letting of any premises, no tenant shall have the right to assign, sub-let or transfer the possession of such premises or any part thereof except with the consent of the landlord or, where such consent shall be unreasonably withheld, with the consent of a Board.”

A tenant is not permitted to sub-let except with the consent of the landlord, but this consent need not be in writing, nor need the consent of the Board be sought except in cases where the landlord unreasonably withholds his consent. The marginal note to s. 31 is in my opinion misleading. This note and section read:

- “31. *Sub-letting by tenant.* (1) Notwithstanding anything contained in this Act, the tenant of any premises may –
- (a) with the consent in writing of the landlord (which consent shall not be unreasonably withheld) and with the consent of a Board; or
 - (b) in any case where, in the opinion of a Board, the consent of the landlord has been unreasonably withheld, with the consent of a Board alone,

sub-let for a period of not more than six months (which period may with the consent of a Board be extended for a further period of six months) any premises of which the tenant is in personal occupation; and upon the expiration of the period for which such premises have been sub-let, the tenant shall be entitled to resume personal occupation of the premises.

- (2) Any sub-tenant to whom sub-section (1) applies who fails, without the consent of the tenant, to give the tenant vacant possession of the premises upon the due date shall be liable to pay to the tenant on demand in writing by the tenant a sum of one hundred shillings in respect of each day in which he continues to occupy the premises adversely to the tenant; and any such sum may be recovered by the tenant as a civil debt.

- (3) Notwithstanding anything contained in this Act, the landlord of any premises in personal occupation of such premises may, with the consent of a Board, let the premises for a period of not more than twelve months, and upon the expiration of the period for which such premises have been let, the landlord shall be entitled to resume personal occupation thereof.
- (4) Any tenant to whom sub-section (3) applies, who fails, unless excused by the landlord, to give to the landlord vacant possession of the premises upon the due date, shall be liable to pay to the landlord on demand in writing a sum of one hundred shillings in respect of each day on which he continues to occupy the premises adversely to the landlord, and any such sum may be recovered by the landlord as a civil debt.
- (5) If, at the date of expiry of the period specified in sub-section (1), the tenant has not re-entered into personal occupation of the premises, the person in occupation thereof shall be deemed to be the tenant of the landlord from the date of expiry of the specified period and, from such date, the landlord shall have against such occupant all the rights and remedies which he would have against his own tenant, and, in addition, the rights and remedies which the tenant would have against a sub-tenant under sub-sections (1) and (2)."

Section 30 is the principal section which governs sub-lettings. Section 31 provides that where certain added conditions are fulfilled there may be sub-letting for a certain fixed period at the termination of which the tenant will be entitled to possession and also damages. These conditions are:

- (1) There must be written consent of the landlord.
- (2) There must be consent of the Board.
- (3) The sub-letting or letting must be for a period not exceeding in the first instance six months.

In connection with condition (1), of the landlord unreasonably withholds his consent the Board alone may grant the sub-letting. In connection with condition (3) the period of six months may be extended with the consent of the Board, but condition (2) must always be present. Sub-section (5) of s. 31 merely states that where the tenant has failed to repossess on termination of the period of six months he will not later be entitled to repossess, and the sub-tenant will have the right to be the direct tenant of the landlord. This subsection clearly and expressly refers to previous sub-sections of s. 31 and the sections must therefore be read as a whole and can only apply where the conditions set out in s. 31 (1) have all been satisfied.

In the instant case there is, in my opinion, no sub-tenancy in accordance with the provisions of s. 31, as there is no written consent of the landlord but only a verbal one as is required in accordance with the provisions of s. 30 of the Act, therefore it must follow that the question of the period of six months does not arise, nor, furthermore, did the tenant have any right to repossess on termination of this period. He did so because it is clear that he was permitted to do so by the sub-tenant. The landlord therefore may claim no rights under sub-s. (5) of s. 31 and this application is wholly misconceived. There is a legal subsisting tenancy between the landlord and tenant which has existed all the time, and there existed also a legal subsisting sub-tenancy between the sub-tenant and the tenant which was terminated by mutual agreement when the premises were handed over to the tenant from the sub-tenant.

I find that the original contractual tenancy still exists. There is no record of it having been terminated by any notice to quit from the landlord. On the contrary, had the tenant sub-let without the consent of the landlord, the sub-tenancy would have been unlawful and the landlord could have sought possession

of the premises under s. 19(1)(g) of the Act, but in the instant case the landlord cannot avail himself under this section, as his oral consent as required by s. 30 was granted.

The appeal is therefore allowed, with costs to the appellants. Costs of the Board I assess at Shs. 250/-. Costs of the High Court will be taxed.

Appeal allowed.

For the appellants:

Tahir Ali, Dar-es-Salaam

P. R. Dastur and Tahir Ali

For the respondent:

W. J. Lockhart-Smith, Dar-es-Salaam

Ralph C De Souza v V R Mandavia and another
[1964] 1 EA 682 (SCK)

Division: Supreme Court of Kenya at Nairobi

Date of judgment: 1 December 1964

Case Number: 492/1963

Before: Farrell J

Sourced by: LawAfrica

[1] Advocate – Negligence – Instructions to defend mortgage suit – New and undecided point of law – Point not pleaded or argued – Whether advocate negligent.

Editor's Summary

The plaintiff, an advocate, sued the defendants for payment of fees and expenses due to him in respect of professional services rendered relative to their defence in a mortgage suit. In the mortgage suit the defendants were sued on an agreement for loan and memorandum of charge by deposit of title deeds for repayment of the principal sum lent. The equitable charge had been registered but not the agreement of loan. The agreement provided that the mortgagees should give six months' notice in writing before calling in the loan. Such notice was given on April 9, 1960 but no action was taken when the time expired. Subsequently interest continued to be paid quarterly and accepted up to and including August 22, 1961. The defendants instructed the plaintiff that on receipt of the notice the first defendant had seen one of the mortgagees who had agreed to withdraw the notice. On the information given to him the plaintiff, believing that there was a good defence to the suit based on waiver or equitable estoppel, filed a defence accordingly and at the hearing of the mortgage suit the plaintiff called evidence and submitted

that there had been waiver of the notice. He cited authorities to support his submission that consideration was unnecessary for the waiver of the notice. The judge disbelieved the evidence of the first defendant and found that there had been no waiver of the notice. In the action by the plaintiff against the defendants they claimed that the plaintiff had disentitled himself to make any claim for his professional services by his negligence in putting forward and persisting in a defence which he should have known had no chance of success and in failing to advise the defendants that the plaint in the mortgage suit disclosed no cause of action as the agreement of loan was an operative instrument creating a mortgage or charge, and that as it was outside the terms of s. 66 of the Registration of Titles Act, it required to conform with s. 46 of the Act and as it did not conform and was not registered it was void and of no effect.

Held –

- (i) on the facts put before the plaintiff by the defendants the defence of waiver was the only defence on the merits and, in view of the authorities, one which was at any rate arguable; accordingly the defence put forward by the plaintiff was not futile or untenable;

- (ii) the point of law on the basis of which the defendants claimed that the point in the mortgage suit disclosed no cause of action was wholly novel and, even assuming (without deciding) that the plaintiff had made an error in judgment in not arguing that point, it was an error on a point of new occurrence and of nice or doubtful construction and not such an error as to defeat his claim to the remuneration.

Judgment for the plaintiff.

Cases referred to in judgment:

- (1) *Central London Property Trust, Ltd. v. High Trees House Ltd.*, [1947] K.B. 130; [1956] 1 All E.R. 256.
- (2) *Tool Metal Manufacturing Co. Ltd. v. Tungsten Electric Co. Ltd.*, [1954] 2 All E.R. 28; [1955] 2 All E.R. 657.
- (3) *Subramonian v. Lutchman* (1922), 50 I.A. 77.
- (4) *Hari Sankar Paul v. Kedar Nath Saha* (1939), 66 I.A. 184.
- (5) *Godefroy v. Dalton* (1830), 6 Bing. 460.
- (6) *Fletcher & Son v. Jubb, Booth & Helliwell*, [1920] 1 K.B. 275.

Judgment

Farrell J: In this suit the plaintiff who at all material times was practising as an advocate of the Supreme Court, sues the defendants for the payment of fees and expenses due to him in respect of professional services rendered to them in connection with their defence in a mortgage suit instituted against them in 1961 and tried in 1962 (Civil Case No. 1496 of 1961). The defendants in their original defence to these proceedings alleged that the plaintiff had disentitled himself to make any claim in respect of his professional services by his negligence in advising them that they had any chance of success and in persisting in a futile and untenable defence. In the alternative they alleged that the bill of costs served upon them was excessive.

At the conclusion of the first day's hearing it became clear from defending counsel's cross-examination of the plaintiff that the negligence sought to be alleged against the plaintiff was by no means confined to the matters referred to in the defence, and the hearing was adjourned to enable the defendants to make formal application for leave to amend their defence. This was done and in an amended defence it is now further alleged that the plaintiff was negligent in failing to advise the defendants that the point in the earlier suit (to which I shall refer as "the mortgage suit") disclosed no cause of action through failure to comply with various provisions of law relating to the registration of mortgage instruments. The case had subsequently proceeded on the basis of the two main allegations, first, that the plaintiff was negligent in putting forward and persisting in a defence which he should have known had no chance of succeeding, and, secondly, that he failed to put forward a defence which must, if put forward, have succeeded.

Before proceeding to deal with the issues raised in this suit, I must consider in some detail the nature and course of the proceedings in the mortgage suit. In that suit the plaintiffs sued the present defendants

and another person who was then the first defendant on an agreement of loan and memorandum of charge by deposit of title deeds for repayment of the principal amount of Shs. 40,000/-, and sued the present first defendant alone on the same agreement of loan and a separate memorandum of charge for repayment of a further principal sum of shs. 10,000/-. Each of the two memoranda of charge was duly registered in accordance with the requirements of s. 66 of the Registration of Titles Act (Cap. 281) (K); the agreement of loan was not registered.

The agreement of loan was in a number of respects similar to an instrument of mortgage, and provided inter alia that the lenders should give six months' notice in writing before calling in the respective loans. It was not disputed that such notice was given by the lenders on April 9, 1960. No action, however, was taken upon the notice at the due date, and quarterly interest continued to be paid and accepted up to and including August 22, 1961. In the meantime, on April 4, 1961, a further notice was sent by the lenders, referring to the previous notice dated almost a year earlier and demanding payment of the principal amounts within a further ten days. Again no immediate action was taken and the plaint was eventually filed on September 8, 1961.

Upon receipt of the plaint the first defendant made arrangements to see the plaintiff and had an interview with him on October 2, 1961, bringing with him his copy of the plaint and the two notices. He informed the plaintiff that on receipt of the first notice he had gone to see Mr. Kassam, one of the lenders and the latter had agreed to withdraw the notice. Again on receipt of the second notice he had gone to see Mr. Kassam who had again agreed not to take proceedings. The first defendant informed the plaintiff that interest had been paid and accepted without question up to and including August 22, 1961.

On the information given to him by the first defendant the plaintiff believed that there was a good defence to the suit based on waiver or equitable estoppel. He accordingly entered appearance for the two defendants and in due course filed a defence admitting receipt of the notice dated April 9, 1960, but alleging that it had been withdrawn provided that interest continued to be paid in accordance with the agreement of loan.

In the defence to the present suit it is alleged that the first defendant at the first interview with the plaintiff informed him that he and his co-defendant did not wish to incur the expense of defending the suit unless the plaintiff considered that they had a good defence to it in law. This was put to the plaintiff in cross-examination, and the plaintiff emphatically denied that anything of the sort was said. The attitude of the first defendant had been that he must defend the case. At the close of the plaintiff's case, no evidence was offered for the defence. That being so the plaintiff's evidence stands uncontradicted on all matters of fact and must be accepted unless there is some inherent reason to the contrary. I make this qualification because in describing his first interview with the first defendant the plaintiff based his evidence on the notes he claimed to have made at the time (Ex. 2); but as the interview took place in early October, and the notes refer to events which happened in the following November, the plaintiff is clearly mistaken and the notes must relate to a subsequent interview. There is, however no reason to assume that the plaintiff's account of the first interview is for that reason inaccurate.

The mortgage suit came on for trial in March, 1962. There was a direct conflict of evidence between Mr. Kassam for the plaintiffs and the present first defendant who alone gave evidence for the defence. The plaintiff then addressed the court at some length on the legal consequences of waiver, and cited a number of authorities to support his submission that consideration was unnecessary. The learned judge, however, after a full consideration of the evidence, disbelieved the evidence of the first defendant and found that there had been no waiver of the notice. Having thus decided the case on the facts, the learned judge in a concluding paragraph went on to deal briefly with the principle of law relied on by the defendants as follows:

"The foregoing is, of course, sufficient to dispose of this suit. Before concluding my judgment, however, I would draw attention to another matter. The defendant's contention is that a notice authorised by the contract between themselves and the plaintiffs to be given calling in the

principal sum was duly given but was subsequently waived at the request of the defendants. There is no suggestion that there was any consideration for the waiver of the notice. In *Stackhouse v. Barnston*, (32 E.R. at p. 925), Sir William Grant, M.R. said:

‘A waiver is nothing; unless it amounts to a release. It is by a release or something equivalent, only, that an equitable demand can be given away. A mere waiver signifies nothing more than an expression of intention not to insist upon the right; which in equity will not without consideration bar the right any more than at law accord without satisfaction would be a plea.’

This seems to me to be clear authority for the proposition, if indeed such authority were necessary, that a mere signification of intention not to insist upon the fulfilment of a contractual obligation does not operate without consideration to nullify that contractual obligation.”

It is clear from his cross-examination of the plaintiff, in the present proceedings that the view of the law expressed in this passage was very much in the mind of defending counsel as affording a basis for the first limb of his allegation of negligence against the plaintiff, namely, that he persisted in a line of defence which had no chance of success.

The case cited as authority for the proposition enunciated by the learned judge was decided in 1805. If this was the last word in the matter and the proposition were so self-evidently correct and so universal in its application that to disregard it would show ignorance of an elementary proposition of law, then the defendants would clearly be entitled to succeed in this part of their case. But there have been subsequent decisions, some of them of comparatively recent date, which show that the proposition, even if in general correct, must be taken as subject to many exceptions and qualifications. The citation from the earlier case appears in a footnote to Halsbury’s Laws (3rd Edn.), Vol. 14 at p. 638. On the previous page and in the same paragraph to which the footnote relates there appears the following passage:

“It seems, that, in general, where one party has, by his words or conduct, made to the other a promise or assurance which was intended to affect the legal relations between them and to be acted on accordingly, then once the other party has taken him at his word and acted on it, the party who gave the promise or assurance cannot afterwards be allowed to revert to the previous legal relationship as if no such promise or assurance had been made by him but he must accept their legal relations subject to the qualification which he himself has so introduced, even though it is not supported in point of law by any consideration.”

The authority cited in support of this proposition is *Central London Property Trust Ltd. v. High Trees House Ltd.* (1) and reference is also made to *Tool Metal Manufacturing Co. Ltd. v. Tungsten Electric Co. Ltd.* (2) a case which subsequently went to the House of Lords. The cases are discussed at length in Cheshire and Fifoot on the Law of Contract (6th Edn.), at pp. 82-87 where the doctrine is described as “equitable estoppel” or “quasi estoppel”. At p. 86 the following summary of the law is put forward:

“A final formulation of the doctrine must await further judicial decision and discussion. Meanwhile the following propositions are offered:

- (a) If a promise is given by one party to a contract not to insist upon his rights under that contract and there is no consideration for that promise the promisee cannot sue upon it.

- (b) If the promisor breaks this promise and sues on the original contract, the promisee may use the promise by way of defence.
- (c) To succeed in this defence the promisee must satisfy the court that it is inequitable to allow the promisor to sue on the original contract; and this he will normally be able to do if he has acted or omitted to act in reliance upon the promise.
- (d) If the promise was intended solely to suspend and not to abrogate the legal rights of the promisor, the promise will continue to operate until reasonable notice has been given by the promisor that he proposes to resume those rights."

The first allegation against the plaintiff is that he persisted in a futile and untenable defence although he was aware that no time had been given by the mortgagees for any valid or other consideration. As I have mentioned, the case was decided on the facts, and the issue as to consideration was never fairly and squarely determined (although the learned judge did express an opinion which the circumstances was clearly obiter). It is not for me to decide this issue now; all I have to decide is whether it was a defence which was properly put forward. On the facts put before the plaintiff by his clients it was the only defence on the merits; and in view of the authorities I have cited, I am satisfied that the defence put forward was at any rate an arguable one and cannot be brushed aside as "futile and untenable". I am not expressing any opinion whether it would necessarily have succeeded if the court had taken a different view of the facts. It is sufficient for the purposes of this case to say that, so far from being negligent in putting forward that defence, the plaintiff might well have been considered negligent if he had failed to put it forward.

The second major allegation of negligence against the plaintiff which was introduced by way of amendment to para. 1 of the original defence is that the plaintiff

"neglected and omitted to advise the defendants, that the plaint showed no cause of action in the plaintiffs in Civil Suit No. 1496 of 1961 for their contravention of s. 59 of the Indian Transfer of Property Act and of ss. 20, 46, 69 and 83 of the Registration of Titles Ordinance (then Cap. 160 of the Laws of Kenya)."

This is by no means a satisfactory way of pleading and fails to give any clear notice of the points in which it is alleged that the plaint was defective. However, no objection was taken to the form of the pleading and the cross-examination and the legal submissions made it reasonably clear what was the case that was being argued.

If I have understood the argument correctly it is this. Under s. 46 of the Registration of Titles Act (Cap. 281 of the Revised Laws) (K.), a charge on land can be created only by using one of the prescribed forms, and must be duly registered. That section, however, expressly recognises as an exception a charge by way of deposit of documents of title as provided for by s. 66 of the same enactment. Sub-section (1) of s. 66 reads as follows:

"A charge may be created by the deposit of documents of title to land under this Ordinance, and shall be evidenced by an instrument in writing in form U in the First Schedule to this Ordinance, which shall be registered, and not charge by deposit of documents of title may be created in any way other than as specified in this section."

In the mortgage suit the plaintiffs relied on two instruments correctly drawn up in the prescribed form (there was no dispute about this) and duly registered. So far so good. But they further relied on an agreement of loan (put in evidence

as Ex. 4 in the instant case) which contained inter alia the provisions for repayment of the loan, and for payment of interest. This agreement was not registered. The submission of counsel for the defendants, is that while a charge may be validly created by strict compliance with the provisions of s. 66, i.e., by deposit of documents of title and by registration of a memorandum of charge, nevertheless, if the chargor does anything in addition, e.g., by drawing up a loan agreement, the transaction is invalidated and can no longer be treated as falling within the term of s. 66 and as being an exception to s. 46. It appeared at one time to be suggested that the agreement of loan should have been registered; but there is no provision under s. 66 for the registration of anything except the memorandum of charge, and I assume that counsel intended to argue that if the transaction could not fall within s. 66, then it must comply with s. 46 and be carried out in the form therein prescribed.

In support of his submission counsel cited a number of Indian authorities. In considering this it is essential to bear in mind that there are important differences between the Indian laws on the subject of mortgages and registration and the law in this country. There is no provision in the Indian law corresponding exactly either to s. 46 or to s. 66 of the Registration of Titles Act. Section 59 of the Transfer of Property Act provides that a mortgage can be effected only by a registered instrument signed by the mortgagor and at least two witnesses. In India this section has no application to equitable mortgages, and a similar result is brought about in Kenya by s. 2 of the Equitable Mortgages Act (Cap. 291) (K.). Finally, under s. 17 of the Indian Registration Act, 1908, instruments affecting any right title or interest in immovable property are required to be registered, and by s. 49 of the same Act no document required by s. 17 to be registered shall affect any immovable property or be received as evidence of any transaction affecting such property, unless it has been registered.

The case most strongly relied on for the defendants is *Subramonian v. Lutchman* (3), a Privy Council case in which the advice was read by Lord Carson. That was a case of mortgage by deposit of title deeds, but the deposit was accompanied by a written document in which were embodied the terms of the deposit. It was held that this memorandum was the bargain between the parties, that without its production in evidence the plaintiff could establish no claim, and that as it was unregistered it ought to have been rejected.

The next case relied on is *Hari Sankar Paul v. Kedar Nath Saha* (4), also a Privy Council decision, of which it is sufficient to cite the headnote:

“Where parties, professing to create a mortgage by deposit of title deeds, contemporaneously entered into a contractual agreement in writing which contained all the essentials of the transaction, expressly conferred a power of sale on the mortgagees and was made an integral part of the transaction, and was itself an operative instrument and not merely evidential:

Held, that the document, to be admissible in evidence under s. 49 of the Indian Registration Act, 1908 required to be registered under s. 17, sub-s. (1)(b) of that Act.”

I do not think it necessary to refer in detail to the other authorities put before me, some of which are discussed in the reports of the two cases cited. On these authorities counsel submits that the so-called “agreement of loan” (Ex. 4) was an operative instrument creating a mortgage or charge, and that as it was outside the terms of s. 66, it required to conform with s. 46 of the Registration of Titles Act (K.), and as it did not so conform, and in any case was unregistered it was void and of no effect.

It is to be noted that the Indian decisions turn on the provision of the Indian Registration Act, and it may readily be contended that they are distinguishable

for that reason and that the requirement of registration of a memorandum of charge under s. 66 of the Kenya Act by implication exempts from registration any accompanying instrument, however much it may approximate to an instrument of charge. On the other hand, an argument of some cogency can be based on the ratio decidendi of the Indian cases, that where there has been a deposit of documents accompanied by an instrument capable of affecting a right title on interest in the property, it is the latter instrument and not the act of deposit which creates the mortgage; and if so that the instrument must conform with the provisions of s. 46 of the Kenya Act and be registered.

I am in the fortunate position of not having to decide in these proceedings whether the agreement of loan is to be construed as an instrument of charge, and if so whether the existence of such an instrument prevented the transaction from being a charge by deposit of documents within the terms of s. 66. What I have to decide is whether the plaintiff was negligent in the performance of his duties as an advocate in not advising the defendants that the plaint in the mortgage suit disclosed no cause of action. For the purpose of deciding this issue I am prepared to assume in favour of the defendants that the submissions of their counsel are well founded and that if such a defence had been put forward it must have succeeded. But that does not necessarily defeat the plaintiff's claim.

The Registration of Titles Act (K.), including the present s. 66, came into force in Kenya in 1920. The history of charges by deposit of documents of title goes even further back, as is evidenced by the Equitable Mortgages Act (Cap. 291) (K.), which came into force in 1909. It is reasonable to suppose that many so called equitable mortgages have been accompanied by some document setting out to a greater or lesser extent the terms of the bargain between the parties. It was at any rate given in evidence by Mr. Maini (P.W.2), the acting Principal Registrar of Titles, that it is common practice for an agreement and memorandum of charge to be taken to the Collector of Stamp Duties for assessment before the memorandum of charge is presented for registration, and that such is the practice regularly followed by banks. Yet it appears that this is the first time when it has ever been suggested in a court that such a practice is not in accordance with the Registration of Titles Act (K.). The point taken, even if it is correct, is a wholly novel one. Can it then be argued that it is the duty of counsel in such a case to advise his clients that they have a defence which has never been raised in a similar case in a period of not less than forty years? It is well established that a solicitor "is not answerable for error in judgment upon points of new occurrence, or of nice or doubtful construction, or of such as are usually entrusted to men in the higher branch of the profession of law". See per Tindal, C.J., in *Godefroy v. Dalton* (5), a dictum approved by Scrutton, L.J., in *Fletcher & Son v. Jubb, Booth and Helliwell* (6) ([1920] 1 K.B. at p. 280), and cited in *Cordery on Solicitors* (5th Edn.), at p. 185. The last part of the citation requires some modification in a territory where the two branches of the profession are fused, and the plaintiff was performing the functions both of solicitor and counsel. But so far as the plaintiff was concerned this was an ordinary case of a mortgage by deposit of documents of title, and there was no reason why he should seek advice from anybody of greater experience than himself. A solicitor, like any other professional man gives no higher undertaking than to bring to the exercise of his profession a reasonable degree of care and skill (*Cordery loc. cit.* at p. 183) and there is no ground for applying a different standard to an advocate in this country. It is perhaps not without significance that counsel for the defendants, who is in some degree an expert on the law of mortgages and immovable property does not appear to have thought of the plea which he now puts forward when he first drafted the defence

in these proceedings, since the original defence was that the plaintiff was negligent in entering appearance and filing a defence in a suit in which the defendants had “very little chance of success”.

I have no hesitation in holding that even if the plaintiff was guilty of an error in judgment (as to which I express no concluded opinion), it was an error on a point of new occurrence and of nice or doubtful construction, and not such an error as to defeat his claim to the remuneration to which he would ordinarily be entitled.

The bill of costs annexed to the plaint is disputed and is remitted to the proper officer for taxation on the basis of the evidence given in this suit by the plaintiff and his witnesses, the defendants having had an opportunity to give evidence and having declined to do so.

There will be judgment for the plaintiff for the sum found due on such taxation with interest at court rates and costs.

Judgment for the plaintiff.

For the plaintiff:

Hosang Shroff, Nairobi

For the defendants:

G. R. Mandavia, Nairobi

Habib Lalji Jetha and others v Akbar Datu Hirji and others [1964] 1 EA 689 (HCT)

Division:	High Court of Tanganyika at Dar-es-Salaam
Date of judgment:	23 June 1964
Case Number:	4/1963
Before:	Sir Ralph Windham CJ
Sourced by:	LawAfrica

[1] Rent restriction – “Dwelling house” – Standard rent – Letting of shop and flat as one entity – Single rent payable for composite premises – No inter-communication between business and residential premises – Business premises and residential premises situated on different floors – Composite standard rent fixed for business and residential premises – Test of dominant user rejected – Whether residential premises and business premises constitute one “dwelling house” – Application of Rent Restriction Act, 1962 (T.).

Editor’s Summary

The appellants owned a building which comprised seven shops on the ground floor and, on each of the

two floors above, four flats. Each of the five respondents was tenant under a single lease of a shop and flat for which he paid one rent. When the appellants applied for assessment of the standard rent of the five flats, the Rent Restriction Board, Dar-es-Salaam, held that by virtue of s. 2 (2) of the Rent Restriction Act, 1962 and English decisions interpreting the corresponding section in the English legislation each flat must be considered not by itself, but as a single unit along with the shop with which it was let, and that the standard rent must be fixed in respect of the composite premises. On appeal it was submitted for the appellants inter alia that the Board should have applied the test of dominant user and that, had the Board applied that test, it would have arrived at a different conclusion.

Held –the Board correctly applied to the premises the test laid down by the English decisions, and rightly held that, upon applying those tests, a residential flat and business premises, where they are both in the same building and let

under a single lease for a single rent with differentiation may properly be held to constitute one “dwelling house” falling within the Rent Restriction Act, 1962, by virtue of the provisions of s. 2 (2) of the Act.

Appeal dismissed.

Cases referred to in judgment:

- (1) *Whiteley v. Wilson and Another*, [1952] 2 All E.R. 940.
- (2) *R. v. Brighton and Area Rent Tribunal*, [1954] 1 All E.R. 423.
- (3) *R. v. Folkestone Rent Tribunal*, [1954] 1 All E.R. 427.
- (4) *Thompson v. Simpson*, [1952] 1 All E.R. 431.

Judgment

Sir Ralph Windham CJ: This is a landlord’s appeal, under s. 11 of the Rent Restriction Act, 1962, against a decision of the Rent Restriction Board, Dar-es-Salaam, in which the Board, upon the appellants’ applications to determine the standard rent of (inter alia) five residential flats let to the five respondents respectively, all being situated in the same building, decided that the standard rent in each case should be fixed not merely in respect of the flat alone, but in respect of the flat and the shop which was in each case let together with it and was situated in that same building. In brief, the Board held that by virtue of the provisions of s. 2 (2) of the Act, and in the light of relevant English decisions interpreting the corresponding section in the English legislation, each flat must be considered not by itself, but as a single unit along with the shop together with which it was let, and that the standard rent must be fixed in respect of that composite entity.

The facts and law in the case, the relevant English decisions, and the reasoning that formed the basis of the Board’s conclusions, are so admirably set out by the learned Chairman of the Board in the written decision which he delivered on behalf of the Board, that I find myself in the position of being unable to do better than to set out verbatim almost the whole of that decision; and this I now do. It reads as follows:

“These applications (Nos. 485-493 of 1962) are made by a landlord for determination of the standard rents of eight flats in a building on the corner of Mkunguni and Swahili Streets. The building was constructed at the end of 1961, after the prescribed date, and we have accordingly caused a valuation to be made of it. There is no objection by either the applicants or by the tenant respondents to the valuation report filed by the government valuer, but it has been submitted on behalf of five of the respondents that the report should govern not only the rents of the flats but also the rents of five shops let to them and also situated in the building.

It is suggested that the Rent Restriction Act, 1962, applies to these shops as well as to the flats.

The building consists of three floors of which the ground floor has seven shops and the first and second floors have four residential flats on each floor. It appears that towards the end of 1961 each of these five respondents entered into a written lease in respect of a shop and a flat together, for a term of three years at a rent expressed as a single sum for both types of accommodation, and subject to payment of a premium. Thus at the present time there are five lettings in the building, apart from other lettings, which involve demised premises consisting of both shops and flats. Under s. 1 (2) thereof the Rent Restriction Act, 1962, applies (subject to certain exceptions not material here) to all dwelling houses, and according to the definition of ‘dwelling house’ in s. 2 (1) of the Act each of these flats is a dwelling house. But the Act goes on to provide

in s. 2 (2) that:

‘The application of this Act to any dwelling house shall not be excluded by reason only that part of the premises is used as a shop . . .’

Now it is clear that no part of any flat is being used as a shop, since the two are quite separate. But if one considers the premises actually let to these five respondents then there is no doubt that part is a dwelling house and part is a shop. Consequently much depends upon the interpretation of s. 2 (2) of the Act.

In this connection certain English authorities have been quoted to us; these deal with the problem arising under s. 3 (3) of the Rent and Mortgage Interest Restrictions Act, 1939, but the first part of the subsection is in similar terms to the provision in our own Act with which we have to deal. The principal authority is *Whiteley v. Wilson and Another* (1), before the Court of Appeal, which was followed in *R. v. Brighton and Area Rent Tribunal* (2) and in *R. v. Folkestone Rent Tribunal* (3) and which criticised the decision in *Thompstone v. Simpson* (4). The weight of this authority appears to establish that in considering such a problem it must first be ascertained whether the premises let consist of a dwelling house, a question of fact not depending upon any tests as to dominant user. If this question is answered in the affirmative then the subsection applies and the whole premises are subject to control.

As we have indicated, when the premises let to these five tenants are considered there is no doubt as to the existence of a dwelling house. Upon the relevant authorities it might then seem that the Rent Restriction Act, 1962, must apply to both parts of the premises without excluding the shop portion. The only difficulty we find in reaching this conclusion here lies in the differences between this building and the sort of premises considered in *Whiteley v. Wilson* (1). We are not dealing simply with a shop on the ground floor with dwelling accommodation above but with seven shops on the ground floor and no less than eight flats above on two floors, only some of which are connected by common tenancies and which are not necessarily directly connected in the physical or structural sense. Of course all the shops and flats are part of the same structure, in that they are all in the same building, and the English decisions appear to depend very much upon that fact.

Thus in *R. v. Folkestone Rent Tribunal* (3), Lord Goddard, C.J., refers to the judgment of Sir Raymond Evershed, M.R., in *Whiteley v. Wilson* (1) as showing that, ‘if the premises are in one block, i.e., if the building is a single structure, and one finds that a substantial part is used as a dwelling house so that one can say that there is a dwelling house there, the Rent Restrictions Acts will apply’. Nevertheless Sir Raymond Evershed, M.R., did comment on the case of *Thompstone v. Simpson* (4) by saying ([1952] 2 All E.R. at p. 943), ‘if the learned judge had found as a fact that the first and second floors should be regarded as one entity, distinct from the shop premises on the ground floor, which were to be regarded as a wholly distinct entity, then I think he might have proceeded to find that the latter entity was outside the protection of the Act’. From this it would appear that we could consider the various floors as being separate entities.

There seems to be little to guide us as to what parts of a single structure might be separate entities. Presumably this is a question of fact depending upon the circumstances of the particular case. There is no similarity in the letting together of a shop in Independence Avenue and a house in Oyster Bay (an example put forward by counsel for the respondents) since they are not part of the same structure. No doubt the two shops which are let single and alone might be separate entities, but the five shops and five flats with which we are now concerned are very closely associated from the contractual point of view and are certainly part of the same structure. The

counterpart lease we have seen has not one single provision which differentiates between the shop and the flat. Again, in our view, it makes no difference whether the flat is directly over the shop on the first floor or is on the second floor, since the means of access to the upper floors is the same and is in itself part of the same structure.

In the circumstances we feel unable to find that these particular five flats are separate entities from their five associated shops. We must conclude that s. 2 (2) of the Rent Restriction Act applies and standard rents must be fixed for the composite lettings of shops and flats in these applications.”

Learned counsel for the appellant has asked me to reverse this decision of the Board, on the ground that none of the English decisions on which it relied are binding on this court; that the test of dominant user laid down in *Thompstone v. Simpson* (4) is a common-sense one and ought to be applied in this case notwithstanding that this test was rejected and the judgment in that case criticized by the Court of Appeal in *Whiteley v. Wilson* (1), which decision has been consistently followed by them since; and that if the test of dominant user had been so applied, the Board would or ought to have arrived at a different conclusion.

I am, with respect, unable to accede to these submissions. Those English decisions which the Board cited and on which it relied were all decisions of the Court of Appeal. And while the decisions of that court are not strictly binding upon this court, they are of strong persuasive authority, especially when they are concerned, as here, with interpreting a section in the English legislation, namely s. 3 (3) of the Rent and Mortgage Interest Restrictions Act, 1939, whose relevant provision is in terms identical with that of s. 2(2) of our Rent Restriction Act, 1962. I am quite unable to hold that the test laid down by an inferior court in *Thompstone v. Simpson* (4) which was rejected by the Court of Appeal, is so manifestly the more correct and common-sense one that it ought to be followed by this court in spite of that rejection.

For the rest, I consider that the Board correctly applied to the premises the tests laid down by the Court of Appeal, and rightly held that, upon applying those tests, a residential flat and business premises, where as in the present case they are let under a single lease for a single rent without differentiation, and where they are both situated in the same building although communication from the one to the other entails passing along a passage or staircase not comprised in the subject-matter of that lease, then the two may properly be held to constitute one “dwelling house” falling within the Rent Restriction Act, 1962, by virtue of the provisions of s. 2 (2) of that Act.

For these reasons this appeal must be dismissed with costs.

Appeal dismissed.

For the appellants:

W. J. Lockhart Smith, Dar-es-Salaam

For the respondents:

N. A. Velji, Dar-es-Salaam

Division: Supreme Court of Kenya at Nairobi
Date of judgment: 21 July 1964
Case Number: 583/1962
Before: Farrell J
Sourced by: LawAfrica

[1] Insurance – Liability insurance – Illegality – Goods – Insurance against loss of or damage to goods in transit – Carriage of manufacturer’s goods by contractor – Licence required by contractor to carry goods for reward – Vehicle unlicensed for carriage on hire – Accident to vehicle – Goods lost or damaged – Claim for damages – Whether breach by contractor of statutory requirement vitiates insurance.

Editor’s Summary

The plaintiffs were manufacturers of biscuits which they distributed for sale throughout East Africa. In 1958 they arranged with the defendants to insure their products whilst in transit to their customers by road, rail or air by means of a marine insurance “open cover” contract by which the plaintiffs were bound to declare each and every shipment of goods to the defendants and in respect of each of which the defendants would issue a policy. In practice the defendants used to issue a certificate of insurance for each shipment which it was agreed had the same effect as a policy. In May, 1961, the plaintiffs despatched a consignment of biscuits from Nairobi to Kampala by a contractor’s lorry. It was common ground that the transporter had no “B” licence for the vehicle as required by s. 4 of the Transport Licensing Act [K.] and in their declaration the plaintiffs did not specify the vehicle as they should have done. The defendants duly issued a certificate of insurance for the consignment. Before it reached its destination the lorry was involved in an accident as a result of which a portion of the consignment was damaged, and a number of cartons and tins of biscuits disappeared. The plaintiffs claimed damages for which the defendants said they were not liable on the grounds that the carriage was illegal and that the plaintiffs’ failure to inform the defendants that unlicensed transport would be used was non-disclosure of a material fact.

Held –

- (i) the plaintiffs were well aware that unlicensed transport was being normally employed by them and they were aware of it in the particular case with which the suit was concerned;
- (ii) the breach of the statutory requirement contained in s. 4 of the Transport Licensing Act [K.] went to the root of the enterprise or adventure and was not merely collateral to it;
- (iii) the defendants were not liable to pay damages to the plaintiffs since an unlicensed lorry was used to transport the goods;
- (iv) there was insufficient evidence to show that the employment of unlicensed transport involved any substantial increase of the risk; accordingly the defendants had failed to show that the failure of the plaintiffs to inform them that unlicensed transport would be used was non-disclosure of a material fact.

Action dismissed.

Cases referred to in judgment:

(1) *Redmond v. Smith* (1844), 135 E.R. 183.

(2) *Cunard v. Hyde* (1858), 121 E.R. 1.

Judgment

Farrell J: The plaintiffs are manufacturers of biscuits and “pasta” which they distribute for sale throughout East Africa. In 1958 they entered into arrangements with the defendants for the insurance of their products in transit by road, rail or air to their agents and customers. The arrangement took the form of a marine insurance open cover. An “open cover” has been described as a contract to insure which is not in itself a policy or enforceable at law, but contemplates the issue of a policy in respect of each individual shipment or consignment of goods. In accordance with the terms of the open cover the plaintiffs as assured were bound to declare each and every shipment, and the defendants to accept the declaration up to a defined limit of value and to issue a policy accordingly. In practice, the defendants used, in lieu of a policy, to issue a certificate of insurance which it is agreed had the same effect as a policy. Thereupon the plaintiff became insured “against all risks of loss or damage to the property insured arising from accident in transit including theft”. A number of conditions were annexed to the open cover which are immaterial for the purpose of this case.

On May 2, 1961, the plaintiffs despatched a consignment of biscuits from Nairobi to Kampala by a lorry belonging to a firm known as Thakar General Produce Agency. Shortly before reaching its destination the lorry was involved in an accident causing it to overturn. A considerable quantity of the biscuits was damaged, and a number of cartons and tins disappeared. The plaintiffs had duly issued a declaration in respect of the consignment, and the defendants had issued a certificate of insurance. The plaintiffs accordingly claim against the defendants for the damage and loss amounting in all to Shs. 8,094/89.

The defendants resist the claim on three grounds:

- (a) illegality of the carriage;
- (b) non-disclosure of a material fact; and
- (c) breach of an implied term that the carriage should be legal.

They also dispute the amount of the loss or damage.

I will deal first with the defence of illegality. It is not disputed that the vehicle on which the goods were carried was unlicensed for the purpose of the journey in question. Section 4 of the Transport Licensing Act (Cap. 404 of the Laws of Kenya, 1962), so far as material provides as follows:

- “(1) No person shall, except under and in accordance with the terms of a licence –
- (a) use a motor vehicle on a road for the carriage of goods –
 - (i) for hire or reward; or
 - (ii) for or in connection with any trade or business carried on by him . . .”

When goods are carried for hire or reward, ordinarily a limited carrier’s or “B” licence is required; where goods are carried for or in connection with the licensee’s own trade or business, the appropriate licence is a private carrier’s or “C” licence. The plaintiffs sometimes used their own vehicles for the transportation of their products, but in the instant case they consigned them by a lorry owned by an independent firm. It was accordingly required by law that the owner of the lorry should be in possession of a “B” licence, at any rate to cover that part of the journey which took place inside Kenya. It is common ground that no such licence was in force.

The defendants accordingly contend that the venture was an illegal one, and that any contract of insurance effected upon it is tainted with illegality and

unenforceable. They base their contention on a passage from the judgment of Tindall, C.J., in *Redmond v. Smith* (1) ((1844) 135 E.R. at p. 190):

“A policy on an illegal voyage cannot be enforced; for it would be singular, if, the original contract being invalid and therefore incapable to be enforced, a collateral contract founded upon it could be enforced. It may be laid down, therefore, as a general rule, that, where a voyage is illegal, an insurance upon such voyage is invalid.”

This passage is cited with approval in Arnould on Marine Insurance (15th Edn.) Vol. II, para. 742. In Macgillivray on Insurance Law (5th Edn.) Vol. I, para. 508, the principle is stated thus:

“If the interest of the assured is tainted with illegality he cannot recover on his policy. The law will not admit the validity of an insurance which assists or encourages the insurers or assured in the commission of an unlawful act.”

A little later (*ibid.*, para. 511) there occurs the following statement of the law:

“If the subject-matter of a contract of insurance is property which is being used by the assured, or with his knowledge and assent, in the furtherance of an unlawful object, the contract is void. Thus, under the old navigation laws a ship could not be validly insured if bound upon a voyage prohibited by law. Similarly, an insurance upon a ship is invalid if with the owner’s knowledge she sails in a condition prohibited by the Merchant Shipping Act; for instance, with a deck cargo of timber in cases where that is prohibited, or with passengers where that is prohibited.”

Two points may be noted in connection with this passage. First, where the illegal act is not committed by the assured, for the principle to apply it is necessary that it should be done with his knowledge and consent. Secondly, though the passage refers primarily to the insurance of a ship or other conveyance, used by the assured for an unlawful purpose, one of the cases cited, *Cunard v. Hyde* (2) relates to insurance on cargo and freight. In that case a ship sailed with part of its cargo on deck contrary to the provisions of a statute, and when the insurance was effected, it was known to the persons interested in the cargo and freight that it was so loaded. It was held that the whole voyage was illegal and that the illegality vitiated the insurance with respect to the whole cargo; and that the assured who were privy to the illegality, could recover nothing from the underwriters.

One further point may be observed. In a footnote to the last-cited passage in Macgillivray there appears the following observations:

“Every breach of statutory duty on the part of the shipowner does not avoid the insurance. The illegality must go to the root of the enterprise and not be merely collateral to its prosecution.”

The authority cited for this proposition is *Redmond v. Smith* (1) where the instance is given of a breach of statutory provisions passed for the protection of merchant-seamen, non-compliance with which in the nature of the case would not make the voyage illegal.

It becomes necessary now to consider the evidence on the question whether the plaintiffs were privy to the illegality. Mr. Rajabally Manji, a director of the plaintiff company, who gave evidence on its behalf, denied that he knew that the vehicle was unlicensed for the carriage of the plaintiffs’ goods. But even if this was so, it was clear from his evidence that he did not consider it in any way incumbent on the plaintiffs to make any enquiries on the point. The

plaintiffs took it for granted that the transporter had a licence. It may be assumed that a person who holds himself out as a transporter has a licence to carry other people's goods. When one visits a doctor one does not ask him to produce his authority to practice medicine.

In the light of this evidence, it is relevant to cite the following passage from *Wilkinson On Road Traffic Offences* (4th Edn.) at p. 264:

“A person who hires vehicles to carry goods, whether for himself or a third party, must see that the licences of those vehicles cover the proposed use and, if a lorry is used under this hiring arrangement in breach of the licence, the hirer aids and abets the lorry owner in this offence (*Carter v. Mace*, [1949] 2 All E.R. 714). But no offence would be committed by a defendant hirer if proper inquiries had been made and he had been given wrong information (*Davies v. Brodie*, [1954] 3 All E.R. 283).”

The first of the cases cited was decided on special facts, and the proposition based on it may be expressed too widely. But it is clear from a consideration of both cases that a hirer is not entitled to assume without any inquiry that there is an appropriate licence in force, and if he does so he is liable to be convicted of an offence.

It follows that even if the evidence of Mr. Rajabally Manji be taken at its face value, the plaintiffs cannot be heard to say that they were not privy to the illegality. But that evidence does not stand alone. Mr. Adams for the defendants gave evidence of a meeting after the accident at which the imposition of more stringent conditions under the open cover was discussed, and according to him Mr. Madatally Manji, the managing director of the plaintiff company, said that his company was unable to accept the proposed stipulation that only licensed carriers should be employed, as the reason for not using licensed carriers was that their charges were too high. If this evidence is believed, it is a reasonable inference that the plaintiff company through its directors was well aware that unlicensed carriers were being employed and that this was the deliberate policy of the plaintiff company. Mr. Madatally Manji had not been a witness for the plaintiffs and Mr. Rajabally Manji had not been present at the meeting. I indicated to counsel for the plaintiffs that I would be prepared to consider an application to call rebutting evidence as to what passed at the meeting, but the invitation was declined and that part of the evidence of Mr. Adams stands uncontradicted. Moreover, it is agreed that the open cover was cancelled shortly after the meeting, and it appears more probable that the reason for this was the imposition of the proposed new conditions rather than any delay by the defendants in settling the claim. I accordingly find that the plaintiffs were well aware that unlicensed transport was normally employed and that notwithstanding the denial of Mr. Rajabally Manji, they were aware of it in the particular instance with which this suit is concerned.

I heard no argument specifically directed to the question whether the breach of the statutory requirement went to the root of the enterprise or was merely collateral to it, but counsel for the plaintiffs submitted that the risk covered was the transport of goods from Nairobi to Kampala, and that such a purpose did not necessarily involve any illegality. This is perfectly true as far as it goes. But the insurance with which I am concerned was in respect of the particular journey to which the declaration and the certificate relate. That was in fact a journey by an unlicensed vehicle. The declaration should have specified the individual vehicle, but omitted to do so. But that in my view does not affect the issue, and in any case the plaintiffs cannot take advantage of their own default in this respect. In *Cunard v. Hyde* (2) Campbell, C.J., in the course of argument remarked ((1858) 121 E.R. at p. 4):

“The absolute prohibition in the statute upon the ship sailing makes the voyage illegal, irrespective of any penalty.”

The statutory prohibition with which I am concerned, contained in s. 4 of the Transport Licensing Act, is in no less categorical terms, and I am satisfied that the breach goes to the root of the adventure and is not merely collateral.

In the result I find that the defendants are entitled to resist the claim on the ground of illegality, and if this is right there is no need to consider the alternative defences of non-disclosure and breach of an implied term. I shall, however, indicate my views briefly on these two issues. Leaving aside any question of illegality, I am not satisfied that the defendants have shown that the failure of the plaintiffs to inform them that unlicensed transport would be used was non-disclosure of a material fact. The test of materiality is that the fact, if known, might have induced reasonable insurers to decline the risk or increase the premium. Mr. Adams has spoken somewhat vaguely of the general experience of insurance companies as to the increased risk involved in the employment of unlicensed transport, but no evidence has been produced from an independent expert to support such a proposition, and in my view the evidence as it stands is insufficient to show that there would have been any substantial increase of the risk. With regard to an implied term that only licensed transport would be used, it is clear from their subsequent conduct that the plaintiffs would not have agreed to any such condition, and a term cannot be implied unless it is self-evident that both parties would have agreed to its inclusion.

In view of my findings on illegality, no question of damages arises. I think it right, however, to say that in my view the plaintiffs have produced prima facie evidence that the goods were loaded at Nairobi by producing the carrier's receipt and the invoices. The provisional burden then shifted to the defendants to negative the inference arising from that evidence. This they have sought to do by pointing to the large quantity of goods unaccounted for on the survey, and by arguing that it is more probable that the absence of the goods was caused by the failure to load them at Nairobi than by pilfering at the scene of the accident. In my view the probabilities are the other way. The defendants say they put the plaintiffs to strict proof of the loss, but a party who purports to call for strict proof does not increase the burden on the other side which in a civil case is to prove his case on the balance of probabilities.

For the reasons given the suit is dismissed and there will be judgment for the defendants with costs.

Action dismissed.

For the plaintiff:

B. Sirley & Co., Nairobi

H. P. Hearn

For the defendant:

Kaplan & Stratton, Nairobi

J. A. Mackie-Robertson, Q.C. and W. S. Deverell

Division: High Court of Uganda at Kampala
Date of judgment: 12 October 1964
Case Number: 455/1964
Before: Sir Udo Udoma CJ
Sourced by: LawAfrica

[1] Criminal – law Trial – Irregularity – Proof beyond reasonable doubt – Receiving stolen property – Visit by magistrate to locus in quo when prosecution case closed – Magistrate doubtful of guilt of accused before visit – Finding that doubts resolved by visit – Whether magistrate should visit locus in quo to resolve doubts as to guilt.

Editor's Summary

A stolen car was found abandoned on a certain road without the engine, gearbox, wheels and some other parts. Acting on information received the police searched the premises of the appellant, which were about half a mile from where the car was found. Nothing incriminating was found in the house, but the missing gear box and four motor wheels, one of which was clearly identified as belonging to the stolen car, were found hidden near the house. When a further search was made the engine of the stolen car was found. On neither occasion was the appellant at home. The house was situated in an isolated area and the places where the motor parts were found were in the open and accessible to the public. The appellant was charged with receiving stolen property and his defence was a denial of possession and an alibi. The magistrate visited the locus in quo after the prosecution case had closed and in his judgment convicting the appellant stated that the slight doubts he had about the guilt of the appellant were completely resolved as soon as he visited the house and the various places had been pointed out to him. On appeal the grounds argued were that it was irregular for the magistrate to have drawn inferences prejudicial to the appellant from his inspection of the locus in quo and that there was no evidence to justify a finding of possession of the stolen goods.

Held –

- (i) the magistrate gave the impression that, prior to his view of the locus in quo, the evidence of the prosecution had created some doubt in his mind as to the guilt of the appellant, and that his view of the locus in quo was necessitated by a desire to resolve such doubt; accordingly for the magistrate to have visited the locus in quo in such circumstances was irregular;
- (ii) there was no evidence directly connecting the appellant with the stolen vehicle or the parts thereof nor of being either the owner or in exclusive possession or control of the land on which the parts were found, nor of having been seen at any time exercising any form of control, however temporary, over the stolen vehicle or any parts thereof;
- (iii) the magistrate came to a wrong conclusion when he held that a view of the locus in quo considered together with the conduct of the appellant in failing to stop at the request of the police on three separate occasions sufficiently established the guilt of the appellant.

Appeal allowed. Conviction quashed.

Cases referred to in judgment:

- (1) *Tameshwar and Another v. R.* (1957), 41 Cr. App. R. 156.
- (2) *Karamat v. R.* (1955), 40 Cr. App. R. 13.

Judgment

Sir Udo Udoma CJ: In this case, the appellant was convicted by the District Court, Mengo, of receiving stolen property contrary to s. 298 (1) of the Penal Code [U.]. He now appeals against the conviction and sentence.

The grounds of appeal filed are as hereunder set forth:

- (1) That the conviction is bad in law.
- (2) That there was no evidence justifying a finding in law of possession by the appellant.
- (3) That the learned magistrate misdirected himself in as much as he drew inferences prejudicial to the appellant from evidence which was irrelevant or did not exist.
- (4) That the learned magistrate failed to direct himself on the onus of proof as required by law in cases of receiving or misdirected himself thereon.

At the hearing of the appeal, I drew the attention of counsel for the appellant to the first and third grounds of appeal and observed that they ought to be struck off as being vague and uncertain. In ground (1) for instance, no reasons are given for the assertion that the conviction is bad in law. It is not clear what makes the conviction bad. It is just the bare assertion. Similarly in ground (3), there are no particulars given of the irrelevant evidence from which inferences are alleged to have been drawn nor particulars of such prejudicial inferences.

Appellant's counsel asked for leave to argue the grounds as he proposed in the course of his submissions to substantiate them. Counsel for the respondent did not oppose the application, nor did he apply for the grounds to be struck off. Leave was accordingly granted to counsel for the appellant whose submissions thereafter may be summarised under two main heads – namely:

- (1) The decision of the magistrate was wrong in law for irregularity, as it was irregular for him to have drawn inferences prejudicial to the appellant from his inspection of the locus in quo; and
- (2) There was no evidence to justify a finding in law of possession of the stolen goods by the appellant.

In his arguments in support of the first ground of appeal, counsel for the appellant referred the court to a passage in the judgment of the learned trial magistrate, which reads as follows:

“It is therefore necessary that the prosecution evidence must be looked at while taking into account the facts which were revealed by the court's visit to the house of the accused. In fact, the slight doubts I had in mind about the guilt of the accused were completely resolved as soon as I go to his home and after those various places had been pointed out to me. I cannot accept that these motor spare parts, which were heavy, were brought by a stranger and placed in the accused's home near his house and garage without his knowledge and consent, and, in fact, this must have been done a few hours after the motor vehicle had been stolen and stripped.”

Counsel submitted that the above passage of the judgment constituted a misdirection in law in that the learned trial magistrate appeared to have visited the locus in quo for the sole purpose of obtaining evidence with which to dispel certain doubts he had entertained over the prosecution's case against the appellant. That was an irregularity, it being an irregular exercise of the right of inspection by the court. If the magistrate had entertained doubt on the evidence as to the guilt of the appellant, it was his duty, it was contended, to give the benefit of such doubt to the appellant, and not to inspect the locus in quo for the purpose of resolving such doubt prejudicial to the appellant.

Counsel for the respondent submitted that the purpose of the inspection was not to dispel doubt but to ascertain the distance between the spots where the stolen goods were hidden and the appellant's house so as to determine whether the appellant could properly be said to have been in possession of the goods. It was submitted that the learned trial magistrate was entitled to view the locus in quo for such purposes and to make use of any information obtained from such a view.

I think it is necessary to state at once that the learned trial magistrate was perfectly entitled to have viewed the locus in quo in the instant case so long as the view took place in the presence of the appellant, his counsel, the prosecution and witnesses, if necessary, and proper notes taken of observations and demonstrations, if any, by witnesses on the spot, and so long as it was appreciated that in law a view of a locus in quo coupled with ocular demonstration by witnesses forms part of the evidence in the case as well as of the trial. See *Tameshwar and Another v. R.* (1).

Lord Goddard, C.J., in *Karamat v. R.* (2) in a passage which I consider pertinent to the issue of inspection raised in the instant case, had said ((1955) 40 Cr. App. R. at p. 18):

"That a view is part of the evidence is, in their Lordships' opinion, clear. It is in substitution for or supplemental to plans, photographs and the like. In such a view as took place and for the purpose for which it was held, there can, in their Lordships' opinion, be no objection to the judge asking a witness to place himself at a particular spot which he has mentioned in his evidence or to show to the jury the place where someone else stood or the direction from which someone came."

It is true, of course, that in the above passage Lord Goddard, C.J., was concerned with a view of a locus in quo by a judge with a jury. But I think the statement and the principle governing inspection implied therein applies with equal force to a view by a judge or magistrate alone. For a judge sitting without a jury or a magistrate sitting alone functions in the dual capacity of a judge of both fact and law; and in viewing a locus in quo does so as a judge of fact. This dual capacity in a judge or magistrate must always be kept clear and distinct.

In the instant case, there can, in my opinion, be no justifiable complaint against, nor a valid objection to, the conduct of the view. For no improper communication nor impropriety of any kind seemed to have taken place, and what is more, there was ample opportunity to cross examine the witnesses who participated in the inspection.

I think, however, that the point which would appear to have been made by the counsel for the appellant, put generally, is that the purpose of a view by a court should not be to gather information extraneous to the evidence already given by witnesses on oath and prejudicial to an accused person, nor to fill up gaps in the evidence, nor to clear doubts entertained as to the guilt of an accused person.

A view of a locus in quo ought to be, I think, to check on the evidence already given and, where necessary, and possible, to have such evidence ocularly demonstrated in the same way a court examines a plan or map or some fixed object already exhibited or spoken of in the proceedings. It is essential that after a view a judge or magistrate should exercise great care not to constitute himself a witness in the case. Neither a view nor personal observations should be a substitute for evidence.

From the observations contained in the passage of his judgment above quoted, the learned trial magistrate gives the impression that, prior to his view

of the locus in quo the evidence of the prosecution had created some doubt in his mind as to the guilt of the appellant, and that his view of the locus was necessitated by a desire to resolve such doubt. In other words, that but for the view, he might not have accepted the case of the prosecution against the appellant. To have visited the locus in quo in such circumstances was, in my opinion, irregular. For if the evidence created a reasonable doubt as to the guilt of the appellant, the inference must be that the prosecution had failed to prove its case; and that doubt should have been resolved in favour of the appellant.

The question is, was this irregularity of such a material kind as that a substantial miscarriage of justice might have arisen therefrom? It is not apparent on the records nor is it clear from the judgment the extent of the doubt, which has been described as slight, entertained by the learned trial magistrate on the evidence as to the guilt of the appellant. It is also far from clear from the judgment as to what aspect of the prosecution's case had created that doubt. Nevertheless it cannot be said that a doubt which had necessitated a view of the locus in quo, and had only to be resolved after such a view was not substantial although described as slight. In the circumstances of the instant case it is impossible to hold that the irregularity was not material having regard to the submissions on the second ground of appeal, which must now be considered.

On the second ground of appeal, namely, "that there was no evidence to justify a finding in law of possession of the stolen goods by the appellant", it was submitted for the appellant that there was no evidence that the appellant was ever in possession of the stolen goods as he was not present at the search of his house and the finding of the goods said to have been hidden in the bush since the appellant's defence was a denial of possession and an alibi.

As the submission on this ground concerns the evidence, it may perhaps be appropriate at this stage to summarise the evidence which had to be considered by the learned trial magistrate.

The evidence was that on March 25, 1964, in the night, a Ford Anglia car No. UEE 643 was stolen by an unknown person. The car was later that night found abandoned at mile 6 1/2 on the Gayaza Road, but without the engine, gearbox, wheels and some other parts. On March 28, 1964, on information received, the house of the appellant, which is also at about mile 6 on the Gayaza Road, was searched by the police. The appellant was absent. There was present a strange woman. There was nothing of incriminating nature found in the appellant's house. But four yards from the appellant's garage, which is attached to the sleeping room of the appellant a gearbox, identified as the gearbox of the stolen car, was found hidden under some old motor vehicle mudguards and other engine spares. Then ten yards from the garage and near to a latrine pit four motor wheels, one of which was clearly identified as belonging to the stolen car, were found hidden and covered with grass. They were taken to the police station.

On March 31, 1964, on a further search, there was also found at a spot four or five yards away from the garage the engine of the stolen car. It was buried in a hole about three or four feet deep. The engine was taken to the police station.

Throughout the searches, it should be noted, the appellant was nowhere to be seen, nor was there any information as to his whereabouts. There is even no evidence that he was being looked for by the police. Later the police visited the appellant's house several times, but it was not until April 10, 1964, that for the first time since the theft that the appellant was seen by Inspector Kasoro (P.W.3) driving in his own car. When signalled to stop, the appellant refused to do so.

On April 14, 1964, again the appellant ignored a police signal to stop. On April 18, 1964, the appellant parked his car at Nakawa, but drove away on seeing Inspector Kasoro (P.W.3) walking towards him. Then on April 22, 1964, the appellant armed with a letter from his solicitor reported at the police station. He was there and then arrested and charged as stated.

At the close of the case for the prosecution, the learned trial magistrate decided to, and did view the locus in quo where the motor parts were said to have been hidden. He noted the following particulars which appear on his record of proceedings:

- “(1) Place where gearbox was found to the garage is eight feet; gearbox to the house eighteen feet.
- (2) Engine to garage twenty-five feet; and engine to the house thirty-four feet.
- (3) Wheels to the house eighteen yards.

The house is very isolated and the nearest neighbours are quarter mile away. Stopped motor car of P.W.1 found half mile from the house of the accused on a side murram road.”

Thereafter on resumption of hearing, the appellant was called upon for his defence, which as already stated was a total denial of possession and an alibi. The appellant, who described himself as a taxi driver, said that he had been away to Nairobi from March 24, 1964, and only returned to Kampala early in April, 1964. He denied being a dealer in motor spares, having closed down his shop four months previously. He also denied having been stopped by Inspector Kasoro (P.W.3).

It is not surprising that the learned trial magistrate, on that evidence, should have felt some doubt as to the guilt of the appellant. The surprise is that such doubt should have been dispelled by a visit to the locus in quo. It is not easy to understand and appreciate the reason for the search of the appellant's house and premises in his absence, and in the absence of anyone known to or related to the appellant. It seems highly irregular for the police to have conducted the search in such circumstances, although nothing of incriminating nature was found in the house.

The evidence of the discovery and recovery of the motor parts was given only by detective Sergeant Francis Ndebeohe (P.W.2). No other witness corroborated the story. The parts of the stolen vehicle were found some distance away from the appellant's house and garage. There is not a tittle of evidence connecting the appellant with the stolen vehicle or of parts thereof directly, nor of being either the owner or in exclusive possession or control of the land on which the motor parts were found, nor of having been seen at any time exercising any form of control however temporary over the stolen vehicle or any of the parts thereof.

In his judgment, the learned trial magistrate directed himself correctly when he stated in this passage of his judgment as follows:

“On the evidence as it stands this accused person cannot be convicted unless the court is satisfied that it was he himself who placed these motor vehicle spare parts in the places they were found in, or he was a willing and consenting party to the act.”

But the learned trial magistrate came to a wrong conclusion when he held that a view of the locus in quo considered together with the conduct of the appellant in failing to stop at the request of the police on three separate occasions sufficiently established the guilt of the appellant. There was insufficient evidence to connect the appellant with the concealment of the motor parts.

On the evidence the various spots where the motor parts were found were in the open and therefore accessible to the public, and anyone could have secreted the motor parts there with or without the knowledge or consent of the appellant, especially as on the finding by the learned trial magistrate the area was isolated, and for all one knows might have been the ideal haunt of thieves.

Whatever may be the suspicion, and one cannot put it higher than that, cast on the appellant by reason of the proximity of his house to the spots where the goods were found, I am of opinion that the evidence before the court falls far short of what is requisite to establish that degree of proof of guilt in a criminal case, that is to say, falls far short of establishing beyond reasonable doubt that the appellant was in fact and law in possession of the stolen motor vehicle or any parts thereof. Furthermore there are not present in the instant case circumstances sufficient to warrant the irresistible inference that the appellant was in possession in law of the stolen motor vehicle or the parts thereof so as to be guilty of the offence charged.

In the result this appeal is allowed. The conviction and sentence are set aside. The appellant is acquitted and discharged.

Appeal allowed. Conviction quashed.

For the appellant:

Haque & Gopal, Kampala

Z. Haque

For the respondent:

The Director of Public Prosecutions, Uganda

A. G. Deobhakta (State Attorney, Uganda)

The Pioneer Investment Trust Limited v Amarchand and others [1964] 1 EA 703 (CAN)

Division:	Court of Appeal at Nairobi
Date of judgment:	18 December 1964
Case Number:	18/1963
Before:	Sir Daniel Crawshaw Ag VP, Sir Clement De Lestang and Duffus JJA
Sourced by:	LawAfrica
Appeal from:	The Supreme Court of Kenya – Edmonds, J.

[1] *Practice – Misjoinder – Joinder of defendants – Action for specific performance against first defendants and for redemption of mortgages and possession of land against second defendants – Plaintiff*

claiming relief against first defendants as vendors under agreement of sale – Possession claimed from both defendants – Misjoinder alleged – Whether common question of law affecting both defendants out of same transaction – Civil Procedure (Revised) Rules, 1948, O. 1, r. 3 and O. 2, r. 2 and r. 3 [K.] – Indian Transfer of Property Act, 1882, s. 85.

Editor's Summary

The first respondents agreed to sell certain premises to the appellant subject to two mortgages held by the second respondents. The appellant subsequently alleged that having paid Shs. 101,799/- on account of the price, the first respondents failed to complete the agreement for sale and that the second respondents as mortgagees were in possession and had refused to allow the appellant to redeem the mortgages on the ground that the equity of redemption had been destroyed and extinguished. The appellant accordingly filed proceedings for an order for specific performance and an order for the redemption of the mortgages and possession of the land. The defences of both the respondents alleged,

inter alia, misjoinder of causes of action as a result of which the appellant applied by chamber summons under O. 2, r. 3 and r. 8 and under s. 97 of the Civil Procedure Act [K.], for leave “if such is necessary” to join the causes of action. The Supreme Court dismissed the application and referring to O. 1, r. 3, held that the claim for redemption did not arise out of the same transaction which gave rise to the claim for specific performance and that the second respondents had no interest in the appellant’s cause of action against the first respondents. The court further held that there was a clear misjoinder and that the court had no discretion except to put the appellant to his election as to the cause of action he wished to pursue. On appeal the grounds as filed by the appellant were (a) that the joinder was justified under s. 85 of the Indian Transfer of Property Act, 1882 and by virtue of O. 2, r. 2 of the Civil Procedure Revised) Rules, 1948, and that the trial judge had erred in holding that O. 1, r. 3 had any application in this case, and (b) that the judge erred in ordering in the proceedings by chamber summons that the appellant should elect which cause of action he would pursue. At the hearing counsel for the appellant applied for and was granted leave also to argue that the joinder was justified under O. 1, r. 3. It was not in dispute that in a suit against the second respondents for redemption, the first respondent could properly be joined but it was contended that the appellant could not also join the same action a claim for specific performance of the agreement against the first respondents as the second respondents were not affected by this cause of action and that accordingly O. 2, r. 2 (1) did not apply. Counsel for the appellant submitted that the relief claimed against the respondents respectively arose out of the same act or transaction and involved similar questions of law and fact, that it was under the agreement that part of the purchase price was paid which gave the appellant an interest or charge on the property entitling him to redeem and that it was on the agreement for sale that the claim for specific performance was based, and further that all the relief claimed need not be common to both respondents.

Held –

- (i) the right to possession was a common question of law affecting both respondents and arose out of the same transaction therefore,
- (ii) both the first and second respondents were properly joined under O. 1, r. 3.

Appeal allowed.

Cases referred to in judgment:

- (1) *Tasker v. Small*, 40 E.R. 848.
- (2) *Drax v. Somerset and Dorset Rly. Co.* (1869), 19 L.T. 626.
- (3) *Bishop of Winchester v. Mid-Hants Rly. Co.* (1867), 17 L.T. 161.
- (4) *Goodford v. Stonehouse Nailsworth Rly. Co.* (1869), 20 L.T. 137.
- (5) *Dear v. Sworder*, [1876] 4 Ch.D. 476.

The following judgments were read:

Judgment

Duffus JA: This is an appeal from a ruling by a judge of the Supreme Court of Kenya on a chamber summons. In this action the plaintiff/appellant seeks an order for the specific performance of an

agreement for sale of land and also seeks an order for redemption of mortgages and possession of the land. There are two sets of defendants, the first defendant/respondents are the owners of the land and the second defendant/respondents, the mortgagees. The appellant alleges that the first respondents failed to carry out an agreement

for sale and further that the second respondents, as mortgagees, are now in possession and have refused to allow the appellants to redeem their mortgages, claiming that the equity of redemption has now been destroyed and extinguished. The appellant claims to have paid Shs. 101,799/94 to the first respondents on account of the purchase price.

The appellants brought this action against both respondents claiming separately, inter alia, as against the first respondents specific performance of the agreement and as against the second respondents a declaration that they are entitled to redeem their mortgages and an order that upon payment of the moneys secured by the mortgagees that the second respondents assign and give up possession of the mortgaged property.

After the second respondents had filed their defence, in which they pleaded as one of their defences that there had been a misjoinder, the appellant took out this chamber summons under the provisions of O. 2, rr. 3 and 8, and under s. 97 of the Civil Procedure Ordinance seeking:

- (i) An order that the plaintiff do have leave, if necessary to join the claim or cause of action for specific performance of the agreement dated July 6, 1960, against the first defendants with the claim or cause of action for redemption of the mortgages and possession of the property and other incidental relief against the second and first defendants as pleaded in the plaint filed herein.
- (ii) Direction as to the hearing of the said claim or cause of action for specific performance of the said agreement against the first defendants and the claim or cause of action for redemption of the said mortgages and possession and other relief against the first and second defendants either together or separately as this honourable court may deem fit.
- (iii) An order as to the costs of the application.

The chamber summons came on for hearing on January 31, 1962. On the application of the first respondents the hearing was adjourned to allow them to apply to set aside an ex parte judgment obtained against them and also to set aside a former order for joinder of the causes for action. The question of costs was reserved.

The summons then came up again for hearing on November 30, 1962, when both counsel for the first and second respondents took a preliminary objection to the hearing of the chamber summons. Arguments were heard and the court reserved its ruling and delivered this on December 15, 1962. In this ruling the court held that it was competent to hear the first part of the chambers summons dealing with the joinder of the causes of action but as to the second part of the chamber summons the court held that "The second objection, if persisted in is met by the plaintiff abandoning his second prayer". The court then proceeded to hear the chamber summons and it appears clear from the proceedings that, although no formal withdrawal of the second part of the prayer was made, that the parties and the court proceeded with the hearing on the basis that the appellant had in fact abandoned this part of the application, and the arguments were whether or not there had been a misjoinder. After he delivered his ruling on the chamber summons on January 11, 1963, the learned judge made no order for costs on the preliminary objection as he held that each party had been partly successful.

I have set out these earlier proceedings in some detail as there has been a cross appeal by the second respondents on the question of the costs reserved on January 31, 1962, and of the cost of the ruling made on December 15, 1962, on the preliminary objection.

I will now consider the main issue in this appeal and that is the application of the appellant on the chamber summons for a joinder of the causes of action against the first and second respondents. The application asks for an order, if necessary, to join this claim for specific performance against the first respondents with their claim against the second respondents for redemption of the mortgages and possession of the land. The appellant had, in fact, already joined these causes of action in the plaint. After hearing arguments the learned judge delivered his ruling on January 11, 1963. His ruling is fully set out in the formal order issued on March 5, 1963, although it must be observed that this ruling was not clearly set out in his written decision. The order as set out formally reads as follows:

“It is Ordered:

- (1) That the plaintiff company’s application be and is hereby dismissed.
- (2) That the plaintiff company do pay to the first and second defendants their costs of the application to be taxed and certified by the Taxing Master of this court.
- (3) That the plaintiff company be put to its election as to which cause of action it will pursue, and on that election there be appropriate consequential orders.
- (4) With regard to the ruling of December 15, 1962, there will be no order as to costs.”

The appellant now appeals against this order. In this appeal as filed he relied on two main grounds:

- (a) That the joinder was justified under the provisions of s. 85 of the Transfer of Property Act (of India), 1882, and by virtue of O. 2, r. 2 of the Civil Procedure (Revised) Rules, 1948, and that the judge erred in holding that O. 1, r. 3 had any application in this case and
- (b) That the judge erred in ordering on these proceedings by chamber summons that the plaintiff be put to his election as to the cause of action he would pursue.

The relevant portion of O. 2, r. 3 states:

“No cause of action shall, unless with the leave of the court, be joined with the suit for the recovery of immoveable property except . . .

- (a) claims for mesne profits or arrears of rent in respect of the property claimed or any part thereof;
- (b) claims for damages for breach of any contract under which the property or any part thereof is held;
- (c) claims for damages for any wrong or injury to the premises claimed; and
- (d) claims in which the relief sought is based on the same cause of action;

Provided that nothing in this rule shall be deemed to prevent any party in a suit for foreclosure or redemption from asking to be put into possession of the mortgaged property, and such suit for foreclosure or redemption and for such delivery of possession shall not be deemed a suit for the recovery of immovable property within the meaning of these rules.”

This application asks for the leave of the court only “if necessary”. Counsel for the appellant states that this application was brought only in “*ex abundanti cautela*” and in the course of his submissions he conceded that the provision to r. 3 did, in fact, apply here and therefore his claim against the second respondents for possession of the mortgaged property would not be deemed to be a suit for the recovery of possession within the meaning of the rule. It appears, therefore, that this application by way of a chamber summons under O. 2, r. 3,

was misconceived and should on this ground have been struck out or dismissed. The question as to whether or not there was a misjoinder was, however, fully argued at the hearing of the summons and the learned judge was, in my view, correct in considering and in arriving at a decision at this stage as it was clearly desirable that a decision on this point should be made as soon as possible, both to expedite the hearing and to save the parties further legal expenses. In any event the judge did decide this question and ordered that the plaintiff be put to his election and this Order is now the subject of this appeal.

At the hearing and in his grounds of appeal the appellant based his right to join the causes of action on the provisions of s. 85 of the Transfer of Property Act, 1882, and of r. 2 of O. 2 of the Civil Procedure (Revised) Rules, 1948.

During the course of the hearing counsel for the appellant applied for and was granted leave to also argue that the joinder was justified under the provisions of O. 1, r. 3.

Section 85 of the Transfer of Property Act provides that all persons having an interest in the property comprised in a mortgage must be joined as parties to any suit under provisions of this Act relating to such mortgage. The appellant claims to have an interest. He claims to have a charge on the property by virtue of s. 55(6)(b) of the Act as he had advanced some Shs. 101,799/- on the purchase price and then by virtue of s. 91 (b) he claims to have the right to bring the action for redemption of the mortgaged property against both the first respondents, the owners and the second respondents, the mortgagees. The respondents concede this point but they argue that the appellant could not also join in the same action a claim for specific performance of the agreement against the first respondents as the second respondents are not affected by this cause of action and that accordingly the provisions of O. 2, r. 2 (1) do not apply in this case. The relevant part of this rule states:

“2(1) Save as otherwise provided, a plaintiff may unite in the same suit several causes of action against the same defendant or the same defendants jointly.”

I agree with the learned judge that the provisions of this rule must be read subject to those of O. 1, r. 3, relating to the joinder of parties.

Order 1, r. 3 states:

3. All persons may be joined as defendants against whom any right to relief in respect of or arising out of the same act or transaction or series of acts or transactions is alleged to exist, where jointly, severally, or, in the alternative, where if separate suits were brought against such persons any common question of law or fact would arise.”

These two rules are similar to O. 1, r. 3 and O. 2, r. 3 of the rules made under the Civil Procedure Code of India and the passage quoted by the judge from Mulla (12th Edn., Vol. 1, p. 543) in dealing with r. 3 of O. 2 is, in my view, a clear statement of the application of these rules in both India and Kenya. I quote:

“... This rule, however, is to be read subject to the provisions of O. 1, r. 3, which relates to joinder of defendants. Hence, two or more defendants may be joined as parties in one suit, though there are two or more causes of action, provided the right to the relief claimed arises from the same act or transaction and there is a common question of law or fact; and this is so although they may not all be jointly interested in all the causes of action. But if the right to the relief claimed does not arise from the same act or transaction, or if there be no common question of law or

fact, the defendants cannot all be joined in one suit unless they are jointly interested in the causes of action as provided by this rule.”

The application of the rule must depend on the particular facts in each case and at this preliminary stage the relevant facts are those alleged in the plaint on which the plaintiff bases his case.

In his submissions before the Supreme Court and the grounds of appeal the appellant relied on the provisions of O. 2, r. 2 to support the claim for joinder, but in the hearing before this court his learned counsel, as the arguments developed, agreed that the claim for joinder really depends on the provisions of O. 1, r. 3.

The provisions of O. 2, r. 2 (1) are clear and when there are several defendants then a plaintiff may unite in one suit several causes of action against the same defendants jointly. In this case the appellant has two causes of action, that for specific performance of the agreement and that for redemption of the mortgages. It is conceded that both respondents would be correctly joined as defendants in that part of the claim seeking redemption of the mortgages but the appellant does not seek to establish that the second respondents should be joined as parties in the claim for specific performance. On this basis I am of the view that the joinder under the provisions of O. 2, r. 2, could not be sustained as causes of action must all be brought against the same defendants jointly. On this question the appellant has not sought to argue that the second respondent could properly be joined as a party to his claim for specific performance, and this would be in accordance with the general rule that the parties to the contract being enforced are the only necessary and sufficient parties to the action and I would refer here in particular to the case of *Tasker v. Small* (1). There are, however, exceptions to this general rule. In this case the appellant avers in para. 13 of his plaint that the second respondents are now in possession of the property in dispute and by para. 14 that the second respondents’ further claim that the equity of redemption has been “destroyed and extinguished”. The second respondents’ defence on this issue is vague. They admit that they hold the keys and have a watchman on the premises but plead that they had not entered into possession as mortgagees. They, however, also plead Supreme Court suit No. 342/1961 in which they aver that the court ordered the first respondent to deliver up possession of the premises to them but do not state the nature of this action. There are authorities which would appear to support their joinder under these circumstances in a suit for specific performance of the agreement for sale of the premises. I would refer to the case of *Drax v. Somerset and Dorset Rly. Co.* (2), where holders of mortgage debentures who have obtained an order for accounts and appointment of a receiver, were held to be properly joined as parties to an action for the specific performance of an Agreement for Purchase of land and to the case of *Bishop of Winchester v. Mid-Hants Rly. Co.* (3) and *Goodford v. Stonehouse Nailsworth Rly. Co.* (4) and *Dear v. Sworder* (5).

I have not fully considered this aspect of the case as the appellant does not seek to join the second respondents on this ground and further I am of the view that the joinder of both respondents is, in any event, justified under the provisions of O. 1, r. 3.

Under O. 1, r. 3, the joinder of several defendants in the same action is justified if any right of relief accrues to the defendant arising out of the same act or transaction and further that if separate suits had been brought against such persons then a common question of law or fact arises. In this case the transaction on which the plaintiff/appellant depends and claims relief against both sets of respondents is his agreement to purchase the land. He bases his claim for specific performance on this agreement and also bases his claim to

redeem the second respondents' mortgages and to recover possession of the land on this agreement. The relief sought against the various defendants need not be joint but could, as in this case, be several. The plaintiff's claim here against both the respondents depends on the validity of his agreement to purchase the premises. A common question of law and fact would arise in the claims against each set of respondents as here again the court has to decide the appellant's rights under the agreement for sale. It is a fact that various other considerations and decisions would have to be made as, for instance, the amounts to be paid to the respective respondents, but this would be ancillary to the main relief that the plaintiff seeks, which is to obtain the legal estate and possession of the land in dispute in accordance with the agreement for sale.

I am, therefore, of the view that the provisions of O. 1, r. 3, apply in this case and that the appellant properly joined both respondents as defendants in this action.

I would, therefore, confirm the ruling insofar as it dismisses the chamber summons, but I would delete that part of the order which puts the plaintiff company to its election as to which cause of action it will pursue.

The question of costs has to be considered under four heads:

- (1) First the costs of January 31, 1962, the subject of para. VII of the cross appeal. This court has already ruled that this is not a proper matter for appeal at this stage. The question of costs was reserved and the case has still not been fully disposed of by the trial court nor has any order been made as to the costs so reserved.
- (2) The costs of the ruling of December 15, 1962. This is the subject of para. VIII of the cross appeal. The learned judge in his final order made no order on the costs of this ruling. I am of the view that his order is, in all the circumstances of this case, fair and equitable. The chamber summons was misconceived but, on the other hand, the parties have had the advantage of full arguments at this stage to settle the question as to the joinder of parties and causes of action.
- (3) The general costs of the chamber summons in the court below. In this respect I will also consider the fact that learned counsel for the appellant only advanced his submissions on O. 1, r. 3, during the hearing of this appeal. On the main question of joinder the appellant succeeds in that this court holds that there has not been a misjoinder and quashes that part of the order putting the plaintiff to his election. As I have stated the chamber summons was misconceived and correctly dismissed, but as a result the question as to joinder was argued and decided and in this respect the appellant has eventually succeeded but on a point which he did not advance in the court below. In all the circumstances it would, in my view be right that each party should bear their own costs in the court below and I would, therefore, delete that part of the order allowing the respondents their costs and make no order for costs.
- (4) And lastly the cost of this appeal. The appellant succeeds only on the question of joinder and only on grounds raised during the hearing of this appeal. I would therefore allow him only one-third of his costs of the appeal as against both respondents.

There remains the cross appeal. I can find no substance in any of the eight grounds advanced. In my view the cross-appeal of the second respondent should be dismissed with costs to the appellant against the second respondent and with no order for the costs of the first respondent.

I would not, in all the circumstances of this case, grant a certificate for Queen's counsel or for two counsel.

Sir Clement De Lestang JA: I agree.

Sir Daniel Crawshaw Ag VP: In his plaint the plaintiff alleged that the first respondents are the registered owners of the suit premises; that in January, 1960, they created an equitable mortgage by deposit of title deeds in favour of the second respondents, and in April, 1960, they created a legal mortgage in favour of the second respondents; that by an agreement dated July 6, 1960, the first respondents agreed to sell the premises to the appellant subject to the said mortgages upon the terms therein contained, and that Shs. 101,799/94 of the purchase money had been paid by the appellant. In his suit the appellant asked, inter alia, for specific performance of the agreement against the first respondents, and in respect of the second respondents a declaration that the appellant had a right to redeem the mortgages. Both sets of respondents in their written statement of defence alleged inter alia misjoinder of causes of action. As a result the appellant applied to the court for leave “if such is necessary” to join the causes of action. The application was dismissed, it being left to the applicant to elect which cause of action it would pursue. The appeal is against that order.

As I see it the only civil procedure rule which applies in this case is O. 1, r. 3, which reads:

“All persons may be joined as defendants against whom any right to relief in respect of or arising out of the same act or transaction or series of acts or transactions is alleged to exist, where jointly, severally, or, in the alternative, where, if separate suits were brought against such persons any common question of law or fact would arise.”

The words “where jointly” should presumably read “whether jointly”, as in O. 1, r. 3 of the Indian Civil Procedure Code.

Section 85 of the Indian Transfer of Property Act provides that all persons “having an interest in the property comprised in a mortgage must be joined as parties to any suit . . . relating to such mortgage . . .” Under s. 91 (a) any person may redeem “having an interest or charge upon the property”. Under s. 55(6)(b) the buyer is entitled as against the seller and to the extent of the seller’s interest in the property, to a charge thereon for the amount of the purchase money paid by him. It is not in dispute that in a suit against the second respondents for redemption, the first respondents would be properly joined.

The learned judge said, however:

“I think there is a fallacy in the contention by the plaintiff. The suit filed by the plaintiff against the first defendants is not a suit relating to the mortgage held by the second defendants over the property which is alleged to have been sold by the first defendants to the plaintiff. It is a suit claiming specific performance of an alleged agreement of sale, and the claim for redemption against the second defendants can arise only if the plaintiff succeeds in his prayer for specific performance.

“. . . what I have to consider is whether, as s. 85 has no application to the frame of the plaintiff’s suit against the first defendants, it may join the cause of action for specific performance with a cause of action for redemption against the second defendants, which as I have said can arise only if the first cause of action is established.”

The judge then referred to O. 1, r. 3 and continued:

“It cannot be said that the claim for redemption arises out of the same transaction which has given rise to the claim for specific performance, and

there appears to be ample authority declaring that where claims arise out of different transactions against different defendants and where there is no common question of law or fact arising between the plaintiff and all the defendants, there is misjoinder and the plaintiff must elect against which defendant he proposes to go on with his suit.”

Finally the judge said:

“It is not suggested that the second defendants have any interest in the plaintiff’s cause of action against the first defendants. In my view, there is clearly misjoinder and the court has no discretion in the matter. The plaintiff must be put to his election as to which cause of action he will pursue, and on that election there must be appropriate consequential orders. The application is therefore dismissed with costs.”

In the memorandum of appeal the appellant complained inter alia that the judge “erred in holding that O. 1, r. 3 had any application to the case”, but counsel for the appellant was given leave at the hearing of the appeal to argue the complete opposite, that the rule did apply and, as I say, it would seem to be the only relevant rule. He submitted that the reliefs claimed against the respective sets of respondents arose out of the same act or transaction, and that similar questions of law and fact arose; that it was under the agreement that the part purchase price was paid which gave the appellant an interest or charge on the property entitling him to redeem, and that it was on that agreement that the claim for specific performance was based; that all the reliefs claimed need not be common to both sets of respondents.

I agree that for the purposes of the first part of r. 3 the transaction out of which the two claims arose was the agreement for sale, but can it be said that “if separate suits were brought . . . any common question of law or fact would arise”? In the second test it is the reliefs arising out of the alleged transaction with which we are concerned and not with the transaction itself. A person not a party to a contract is not ordinarily made a party to a suit thereon, and in many cases of a claim for specific performance of the sale of an equity of redemption a mortgagee would be a mere spectator unable in any way to influence its result, or be affected thereby other than by a possible change in the person holding the right to redeem, a matter in which a mortgagee would not normally be materially interested. Apart from the allegation of misjoinder, the written statement of the first respondents brings in issue only the terms of sale. In his reply to the written statement of the second respondents, the appellant gave as the only ground for joinder, the common interest in the mortgage suit.

I am very doubtful whether the validity of the agreement which is in issue between the appellant and the first respondents can from the pleadings be said to be a fact or matter of law to be tried in the redemption suit. The common question of fact or law must, I should have thought, be one in issue against all the defendants and be one of substance. The rule is one of convenience; even if there is a common question it seems the courts may exercise discretion in allowing joinder. I have not seen a relevant authority which leads me to the conclusion that a suit for specific performance of a sale of an equity of redemption has necessarily a question of law or fact in common with a redemption suit. *Tasker v. Small* (1) is, as I read it, some authority the other way, and I think the following obiter therefrom is applicable to our O. 1, r. 3 as it was to the then procedure in England. The plaintiff had contracted to purchase the equity of redemption, one Phillips being the mortgagee. The Lord Chancellor (Cottenham) said (40 E.R. at p. 851):

“Phillips has no interest in the specific performance of the contract; he is no party to it; and the performance of it cannot affect his security or interfere with his remedies. Supposing, however, that it was competent for the plaintiff to redeem Phillips’s mortgage, he can only be so entitled as standing in the place of the mortgagor; but a mortgagee can never refuse to restore to his mortgagor, or those who claim under him, upon repayment of what is due upon the mortgage, the estate which became vested in him as mortgagee. To him it is immaterial, upon repayment of the money, whether the mortgagor’s title was good or bad. He is not at liberty to dispute it, any more than a tenant is at liberty to dispute his landlord’s title. Phillips, therefore, is bound, upon payment, to restore the legal estate to his mortgagor or to those who claim under him. By Phillips’s mortgage deed the equity of redemption was reserved to Small. If the plaintiff could show such equity of redemption to be vested in him, he would be entitled, upon paying the mortgage debt, to demand a re-conveyance of the estate, without regard to any other question affecting the title to the property.”

In the instant case, however, a material issue has been introduced which it seems to me is common to both sets of respondents. The plaint asks for possession of the suit premises as against the first respondents under the agreement for sale, and complains that the first respondents consented to the second respondents taking possession; they ask that the second respondents be ordered to give up possession. The first respondents in their written statement deny the validity of the agreement, and impliedly deny the right of the appellant to possession. The second respondents deny the right of redemption and the right to possession irrespective, so far as they are concerned, of the validity of the agreement for the purchase of the equity of redemption. The right to possession is, therefore, a common question of law affecting both sets of respondents and arises out of the same transaction. In these circumstances I am of the opinion that the two sets of respondents were properly joined and I think the authorities support that view (see *Bishop of Winchester v. The Mid-Hants Rly. Co.* (3) (17 L.T.R. (N.S.) at p. 163). I would accordingly allow the appeal. I do not think that, whether or not the manner in which the question of joinder was brought before the Supreme Court for decision was proper or not, it should in the circumstances affect the question of costs at any stage of the application. Wrongful joinder was alleged in the written statements of defence of both sets of respondents and so became a preliminary issue. That issue was argued before and decided by the judge on its merits, on the said application, and has now been decided by us.

I have read the judgments of my brother judges and there will accordingly be an order that the appeal be allowed and the cross-appeal be dismissed on the terms as to costs proposed by Duffus, J.A.

Appeal allowed.

For the appellant:

J. K. Winayak & Co., Nairobi

J. M. Nazareth, Q.C., and J. K. Winayak

For the first respondents:

Bali Sharma & Co., Nairobi

E. P. Nowrojee and Nahar Singh

For the second respondents:

Khanna & Co., Nairobi

D. N. Khanna and Hoshang Shroff

Mutwalubi Bukulu and others v Busoga
[1964] 1 EA 713 (HCU)

Division: High Court of Uganda at Jinja
Date of judgment: 15 June 1964
Case Number: 93/1964
Before: Sir Udo Udoma CJ
Sourced by: LawAfrica

[1] Native law and custom – African district court – Trial by judge with assessors – Strictures upon assessors by judge – Attack upon assessors’ integrity and motives – Disagreement as to guilt of accused between judge and assessors – Accused found guilty by judge – Appeal – Ground of appeal that judge gave no reasons for disagreeing with assessors – Allegation that judge influenced by his personal knowledge of case – African Courts (Amendments) Ordinance, 1962, s. 4 A (e) (U.).

Editor’s Summary

The appellants were charged jointly with and convicted upon two counts of burglary and attempted burglary contrary to customary law by the assistant chief judge of the District African Court of Busoga sitting at Kaiti. The case was tried with the aid of two assessors who disbelieved the prosecution case and were both of the opinion that the prosecution witnesses were merely guessing that the appellants had committed the offences charged. The judge did not conform to the opinion of the assessors. In his judgment he accepted the case of the prosecution, found the four appellants guilty and convicted them. He disagreed with both assessors on points of fact and said “the reason is not that they did not see the facts but that both assessors are not worthy the name of assessors as they think in religion more than justice”. He also observed that both assessors were Moslems and that the accused were sons of a prominent Moslem well known to them. On appeal the substantial grounds argued on behalf of the appellants were that the reasons given by the judge for not conforming to the opinion of the assessors should be treated as no reasons at all because it was contrary to public policy for him to make improper and unfounded allegations that the assessors were more interested in religion than in justice and that it was wrong in law for him to have imported in the case his personal knowledge and be influenced by such knowledge. On behalf of the respondent it was contended firstly, that the judge had sufficiently complied with the proviso to s. 4 A (e) of the African Courts (Amendments) Ordinance No. 12 of 1962 since he had given reasons for not conforming to the opinion of the assessors and secondly, that whatever was drawn from the personal knowledge of the judge related only to the issue of motive, about which there was abundant evidence before the court.

Held –

- (i) it was beyond the realm of propriety for the judge to have described the two assessors as unworthy of the name, and also to have implied that he had no faith in their sense of judgment and integrity because they were incorrigible and their motives suspect;
- (ii) the strictures were some of the reasons advanced by the judge for disagreeing with the findings of

the assessors and, therefore, there was compliance with s. 4 A (*e*) *ibid.*;

- (iii) the District African Court of Busoga was a customary court enjoined by law to administer native law and custom and could not strictly be said to be bound by the ordinary rules of evidence; it was competent for the court as repository of native law and customs to draw upon personal knowledge of such law and customs;

- (iv) whatever criticisms one might have of the projection of his personal knowledge into his judgment, accepting as he did the evidence of the prosecution, there could be no doubt that there was abundant evidence to support the findings of the judge that the appellants had committed the offences with which they were charged.

Appeal dismissed.

Judgment

Sir Udo Udoma CJ: This is an appeal by the four appellants against their conviction by the assistant chief judge of the District African Court of Busoga sitting at Kaiti. The appellants were charged jointly with two counts of burglary and attempted burglary contrary to customary law.

The case was tried by the assistant chief judge with the aid of assessors. At the trial, the case of the prosecution in substance was that in consequence of a dispute which had resulted in the husband of Biwenbwaku Mutesi Kubonabona (P.W.1) and his two sons being convicted and sent to prison, the four appellants had, in the night, broken into the house of one of the sons of Biwenbwaku Mutesi Kubonabona then in prison; and subsequently thereafter in the same night had attempted to break into the house of Biwenbwaku Mutesi Kubonabona with the intent, on both occasions, to commit a felony therein. The defence of the appellants was a complete denial of the offence and an alibi.

After due hearing, the court was divided in its opinion. The two assessors disbelieved the case of the prosecution, and were unanimously of the opinion that the witnesses for the prosecution were merely guessing that it was the four appellants who had committed the offences charged, since in their opinion it was impossible for the prosecution witnesses to have recognised the four appellants in the night in question.

In his judgment the assistant chief judge did not conform to the opinion of the assessors. After a review of the facts, he accepted the case of the prosecution and found the four appellants guilty, convicted and sentenced each of them to a term of one year's imprisonment on each count, both sentences to run consecutively.

Against that conviction, the four appellants have now appealed. The grounds of appeal filed, which in this judgment are more correctly numbered, were as follows:

- (a) There is a misjoinder of counts as the accused persons were convicted of both burglary and attempted burglary.
- (b) The President of the District African Court did not comply with the African Courts (Amendments) Ordinance, 1962, s. 4 A (e) in that he did not record his reason for not conforming to the opinion of the assessors who found the appellants "not guilty" except by making improper unfounded allegations stating:
"Both assessors are not worthy the name of assessors as they think in religion more than justice."
- (c) The President in his judgment displayed a personal knowledge of the dispute, and alleged and approved of his own investigation and recorded as his own.
- (d) There was no identification of weapons referred to.
- (e) The conviction is against the weight of evidence.

At the hearing of this appeal, counsel for the appellants, by leave abandoned ground (a). On ground (b) he submitted that the reasons given by the assistant chief judge for not conforming to the opinion of the assessors should be treated as no reasons at all because it was contrary to public policy for the assistant chief judge to have made improper and unfounded allegations against the assessors by stating that the assessors were more interested in religion than in justice.

For the Busoga Government, counsel contended that the assistant chief judge sufficiently complied with the proviso to s. 4 A (e) of the African Courts (Amendments) Ordinance No. 12 of 1962, since he had given reason for not conforming to the opinion of the assessors, which is all that the law requires of him.

In refusing to conform to the unanimous opinion of the assessors, the assistant chief judge, after a review of the facts stated as follows:

“I accept all these aforesaid as facts. I had the opportunity of observing the prosecution witnesses and they convinced me that they are telling the truth. In fact, the accused persons were unable to shake them in cross-examination. It is true I disagree with both assessors on points of fact but the reason is not that they did not see the facts but that both assessors are not worthy the name of assessors as they think in religion more than justice. Both are Moslems and the accused persons are sons of a prominent Moslem leader well-known to them; in fact later discoveries reveal that the two assessors were approached by the defence side not from any bad motive perhaps, but from a merciful aspect. They say that the witnesses were just guessing and did not see the accused persons, but I have visited the site once and I know it was quite easy to identify the accused persons with the aid of a lamp and moonlight. I have had quite enough from these two assessors previously when judging cases and much has been said about them but devoid of any conclusive evidence it is impossible for me to do anything except to be left doubting them.”

I have quoted this passage of the judgment in full because counsel for the appellants has complained about the strictures made against the assessors by the assistant chief judge. He has submitted that they were groundless and unjustified. There is no doubt that these strictures are in very strong terms, and one would wish they were never made. This court is not, however, in a position to say whether or not they were unfounded or unjustified.

Two passages of these strictures are particularly objectionable. It was, I think, beyond the realm of propriety for the assistant chief judge to have described the two assessors as unworthy of the name, and also to have implied that he had no faith in their sense of judgment and integrity because they were incorrigible and their motive suspect.

Surely if the assistant chief judge did discover that the two assessors had been approached before the trial on behalf of the accused persons and that they were likely to be influenced in their opinion, it was his duty to have warned them in his address in no uncertain terms of the seriousness of their responsibility, and that in the interest of justice it would be wrong for them to be influenced in their decision by outside agencies; and if as it appears from his experience he had found the assessors unworthy, it was for him to have refused to make use of them. It may be that the assistant chief judge was not aware of his powers in this respect. The concluding portion of the strictures, on the other hand, leaves one with the impression that there was insufficiency of evidence to warrant the imputation of corrupt motive against the assessors.

While one may question the propriety of these strictures, it is difficult to see how the attack on them supports the submission that the assistant chief judge had failed to comply with the proviso to s. 4 A (e) of the African Courts (Amendments) Ordinance, 1962. It seems to me that the contrary is the correct view. The integrity and sense of judgment of the assessors became the butt of attack by the assistant chief judge in an endeavour to justify his refusal to conform to their opinion. The strictures are surely some of the reasons advanced by the assistant chief judge for disagreeing with the findings of the assessors. This ground, therefore, fails as I am satisfied that the assistant chief judge duly complied with the proviso to s. 4 A (e) of the African Courts (Amendments) Ordinance, 1962.

Appellant's counsel submission on ground (c) was that it was wrong in law for the assistant chief judge to have imported his personal knowledge into the case, and that by so doing the assistant chief judge allowed himself to be unduly influenced by his personal knowledge of the dispute.

While agreeing that the assistant chief judge appears to have drawn a good deal from his personal knowledge, counsel for the respondent, in answer to the submission of appellants' counsel, contended that whatever was drawn from the personal knowledge of the assistant chief judge related only to the issue of motive about which there was abundance of evidence before the court, and not to the facts of the case.

The passages in the judgment of the assistant chief judge reflecting his personal knowledge complained of are as set out hereunder:

"I had the opportunity of visiting the actual site and I know the position of the neighbourhood. The possibility of mistaken identity therefore does not arise. I have also seen the houses of the first two witnesses and visibility from the inside at night is not impaired taking into consideration the nature and state of the house where P.W.1 and P.W.2 say they were . . . both assessors are not worthy of the name as they think in religion more than justice. Both are Moslems and the accused persons are sons of a prominent Moslem leader well-known to them. . . . They say that the witnesses were just guessing and did not see the accused, but I have visited the site once and I know it was quite easy to identify the accused persons with the aid of a lamp and moonlight."

In addition to these passages, the assistant chief judge in his judgment referred to certain facts concerning the case between Hadji Harouna Nseko, the father of the appellants and Kubonabona, the husband of P.W.1 and Kubonabona's two sons, which had resulted in Kubonabona and his two sons being sent to prison. He held that that case supplied the motive for the appellants breaking into the house of Kubonabona's sons, and attempting to break into the house of P.W.1 with the intent to kill P.W.1 and P.W.2.

Counsel for the appellants' submission should have been of considerable weight if I were here considering the judgment of a subordinate court presided over by a resident magistrate. It must be realised that the District African Court of Busoga is a customary court enjoined by law to administer native law and customs. It cannot strictly be said to be bound by the ordinary rules of evidence. I think it is competent for it to draw from its personal knowledge of native law and customs, it being regarded as the repository of such law and customs.

It is impossible to ascertain from the judgment whether when visiting the locus in quo the assistant chief judge was there alone or with the assessors, witnesses and the appellants, which should be the correct procedure.

In my view there was nothing irregular in the assistant chief judge referring to the facts of the court case which had resulted in the imprisonment of Kubonabona and his sons because that was the basis of the complaint by P.W.1 and P.W.2, nor was it irregular for the assessors to have been described as being more interested in religion than in justice. All the parties in the case as well as the assessors, were known to the assistant chief judge. They are all local people. The assistant chief judge also knew their religion and, particularly the appellants were described in the proceedings as Moslems. These were matters which were peculiarly within the knowledge of the assistant chief judge.

Whatever criticisms one may have of the projection of his personal knowledge by the assistant chief judge, into his judgment, accepting as he did the evidence of the prosecution, there can be no doubt that there was abundance of evidence to support his findings that the appellants were the persons who had committed the offence with which they were charged, that being the real issue which was seriously contested by the appellants.

The assistant chief judge had concluded his judgment on the issues of fact in the following terms:

“In any case, I am convinced from the evidence that the facts as narrated above actually happened. I am satisfied beyond any doubt that the four accused persons went into the house of the two first prosecution witnesses on the night of November 6, 1963 to November 7, 1963, and that they were together in one group with sticks and panga for one common purpose . . . I am satisfied that the felony which the accused persons intended to commit has been duly established, viz., to murder.”

These findings cannot be said to be unreasonable in view of the evidence before the court. That being so, grounds (d) and (e) which were argued together under the general head, that the decision was unreasonable having regard to the evidence, also fail.

The appeal is therefore dismissed. Conviction and sentence confirmed.

Appeal dismissed.

For the appellants:

J. B. Patel, Jinja

For the respondent:

The Director of Public Prosecutions, Uganda

M. P. Radia (State Counsel, Uganda)

Kabaka v Prince George Mawanda [1964] 1 EA 718 (CAK)

Division:	Court of Appeal at Kampala
Date of judgment:	4 September 1964
Case Number:	6/1964
Before:	Sir Daniel Crawshaw Ag P, Sir Clement De Lestang and Duffus, JJA

[1] Appeal – Jurisdiction – Right of appeal – Interlocutory decision – Order extracted after decision – Appeal – Right of appeal on assumption that order made constituted a preliminary “decree” under Civil Procedure Ordinance (Cap. 6), s. 2 (U.).

Editor’s Summary

The respondent as the eldest son of the late Kabaka, Sir Daudi Chwa, sued in the High Court of Buganda claiming declarations that he was entitled under customary law to the style and dignity of Kiwewa and as such to a financial allowance. The Kabaka’s Government filed a defence to the effect that, although the respondent was qualified for appointment as Kiwewa, any such appointment was in the gift of the Kabaka and no one was entitled to that dignity and style without appointment by the Kabaka. The Kabaka’s Government then moved for an order transferring the proceedings to the Principal Court as being within that court’s jurisdiction. At the hearing of the motion counsel for the respondent objected that, pursuant to the proviso to s. 6 (4) of the Buganda Courts Ordinance, the Principal Court had no jurisdiction to try cases in which the Buganda Government was a defendant except with the previous consent of the Resident and since the office of Resident no longer existed there was no one who could give the requisite consent. The judge ruled in favour of this submission and dismissed the motion whereupon the Kabaka’s Government applied under r. 23 (3) of the Court of Appeal Rules for leave to appeal. The grounds of appeal were inter alia that the judge had erred in interpreting the proviso to s. 6 (4) of the Ordinance as limiting the jurisdiction of the Principal Court instead of limiting only the competence of a plaintiff to institute proceedings; that the judge should have applied the maxim “ut res magis valeat quam pereat” and that the ruling of the judge was not an order but a preliminary decree appealable as of right. Counsel for the Kabaka’s Government conceded that if the decision resulted in an order no appeal lay. For the respondent it was submitted at the hearing of the motion for leave to appeal that following the decision of the judge an “order” had been extracted, that the order was made on an interlocutory application and could not be a preliminary decree.

Held – since the decision was procedural and related to jurisdiction and did not come within the definition of “decree” in s. 2 of the Civil Procedure Ordinance, no appeal lay.

Appeal dismissed.

Judgment

Crawshaw Ag P, read the following ruling of the court: We are satisfied that the preliminary objection raised by the respondent is a good one and that the appeal should be dismissed. In our view the decision of the trial court was a procedural one relating to jurisdiction, and that it was not one which came within the definition of “decree” in s. 2 of the Civil

Procedure Ordinance, cap. 6 of the Uganda Laws. If that is so, it is not disputed that this appeal does not lie. The appeal is accordingly struck out with costs.

Appeal dismissed.

For the appellant:

The Attorney General, Kabaka's Government

P. M. Jayarajan

For the respondent:

Wilkinson & Hunt, Kampala

R. E. Hunt

Universal Cold Storage Ltd, v Kenya Co-Operative Creameries Ltd [1964] 1 EA 719 (HCU)

Division: High Court of Uganda at Kampala
Date of judgment: 27 October 1964
Case Number: 520/1963
Before: Sir Udo Udoma CJ
Sourced by: LawAfrica

[1] Contract – Breach – Contract to purchase milk – Purchaser not to “take” milk except from vendor – Storage of competitor’s milk by purchaser – Whether storage constitutes “taking” within context of the contract.

Editor’s Summary

The plaintiff and defendant entered into a written agreement whereby the plaintiff was to purchase 660 gallons of milk daily from the defendant. One of the terms was that the agreement could be terminated forthwith by the defendant in certain events therein set out or by three months’ notice in writing. It eventually came to the knowledge of the defendant that a competitor in Kenya was selling milk in Uganda whereupon a meeting of the defendant’s retail customers, including the plaintiff, was held and it was unanimously agreed that no assistance be accorded to the distribution of the competitor’s milk and that if possible the competitor should be kept out of the Uganda market. Meanwhile one, Patel, then an agent for the distribution of the competitor’s milk in Uganda, approached the plaintiff and obtained permission to store his milk in the plaintiff’s cold store. On June 20 and 21, 1963, respectively in the usual course of inspection by the defendant of the plaintiff’s premises some of the competitor’s milk was found, and on June 21, 1963 some of this milk was seen being loaded into a car by an Asian, who, on seeing the representatives of the defendant, drove off. The defendant accordingly by letter dated June 21, 1963 forthwith terminated its agreement with the plaintiff who thereupon sued claiming damages. At the

hearing the main issue was whether the storage of the competitor's milk was a breach of cl. 16 (c) of the agreement entitling the defendant to terminate the agreement. Clause 16 (c) provided that if without the written consent of the defendant the purchaser should take milk from any other person when the defendant is able and willing to deliver that quantity of milk to the plaintiff the defendant should be entitled forthwith to terminate the agreement. Counsel for the plaintiff submitted that the agreement was a contract for sale of goods and that for the proper construction of the agreement, the word "take" in cl. 16 (c) must in the context mean "purchase" or "take" with the intention "to resell" and not merely "to store". It was further submitted that merely to allow storage did not constitute a breach of the provisions of cl. 16 (c) and, therefore, could not entitle the defendant to terminate the agreement. For the defendant it was contended that by storing

the milk the plaintiff “took” it for storage and for distribution in the market and, therefore, committed a breach of the agreement. It was also argued that the word “take” must mean “take with a view to storage and distribution” and not merely “take by way of purchase” as storage of milk was an essential prerequisite to distribution of milk

Held –

- (i) according to the terms of cl. 16 (c) of the agreement the plaintiff could only properly be said to “take” milk when such milk was milk which it required in the interests and for the purpose and in furtherance and in fulfilment of its business commitments as a retailer and distributor of milk;
- (ii) mere “taking” of milk and storing it in the cold store without using it in any way connected with the business undertaking of the plaintiff would not amount to “taking” within the context and intendment of cl. 16 (c) of the agreement; therefore, the plaintiff did not in any way commit a breach of the provisions of cl. 16 (c).

Judgment for the plaintiff.

Judgment

Sir Udo Udoma CJ: This is a claim by the plaintiff, a limited liability company, against the defendant, also a limited liability company, for damages for a breach of contract.

In paras. 3, 4 and 5 of its plaint the plaintiff pleaded as follows:

- “3. By an agreement dated April 20, 1962 a copy of which is annexed hereto and marked “A” it was agreed inter alia that the defendant would sell and the plaintiff would purchase 660 gallons of sweet clean milk daily upon the terms and conditions contained in the said agreement, subject to the provision that the said quantity could be varied within the limit stated therein, by defendant, by seven days’ notice in writing to that effect.
- 4. It was further provided that the said agreement could be terminated by the defendant in any of the events set out in cl. 16 of the said agreement; or upon the giving of three months’ notice in writing by defendant. Plaintiff will refer to the said agreement at the trial for the full term and meaning thereof.
- 5. Defendant has not given three months’ or any notice of termination of the said agreement or variation of quantity, but did, on June 22, 1963, and thereafter cease to supply any milk to plaintiff. Plaintiff has at all material times abided by and been ready willing and able to abide by the terms of the said agreement.”

In answer to the averments contained in paras. 3, 4 and 5 of the plaint set out above the defendant pleaded in paras. 2, 3, 4, 5, 6, 7 and 8 of the statement of defence the following:

- “2. On or about the early morning of June 20, 1963, the plaintiff took at its business premises in Kampala from a person or persons not at present identified but other than the defendant or its authorised agent or agents, and without the consent either written or otherwise of the defendant, a quantity consisting of not less than eighteen tins containing cellophane packs of ‘Winpack’ milk.”
- 3. On or about the early morning of June 21, 1963, the plaintiff at the said business premises in Kampala Road, Kampala, similarly took eighty to ninety tins containing the said ‘Winpack’ milk from a person or persons not at present identified but other than the defendant or

its authorised agent or agents and without the authority, written or otherwise, of the defendant.

4. The said 'Winpack' milk is not produced, marketed or in any way processed, handled, distributed or dealt in by the defendant but is the product of or dealt in, processed, handled or distributed by a dairyman or dairymen in Turbo or elsewhere in Kenya who are not members of the defendant co-operative.
5. The plaintiff on divers other occasions in Kampala took milk from persons other than the defendant or the duly authorised agent or agents without the consent, either written or otherwise, under circumstances similar to those set out in paras. 2 and 3 supra but the defendant is unable to give particulars thereof until discovery.
6. The defendant on the said 21st and 22nd days of June, 1963 and at all other times material, were able and willing to deliver to the plaintiff such quantity of milk as the plaintiff required.
7. The taking of milk as aforesaid from persons other than the defendants constituted a breach of cl. 16 (c) of the said agreement which reads:

 'if without the written consent of K.C.C. the purchaser takes milk from any person other than K.C.C. at a time when K.C.C. is able and willing to deliver to the purchaser such quantity of milk as the purchaser requires.'

and entitled the defendant to terminate the said agreement forthwith pursuant to cl. 16 (1) thereof which read:

 'subject as hereinafter mentioned to terminate forthwith this agreement and/or all or any other agreements for the supply of milk then subsisting between K.C.C. and the purchaser.'
8. Notice of termination of the said agreement was accordingly given to the plaintiff by the agent of the defendant by letter dated June 21, 1963, a copy of which letter is annexed hereto and marked 'KCC.1'."

Thus on the pleadings and particularly having regard to the averments contained in para. 7 of the statement of defence, the main issue for determination was whether or not the defendant was justified in terminating, as it did, the agreement between the plaintiff and the defendant.

On October 12, 1964 before the commencement of the hearing of the suit therefore, both the counsel for the plaintiff and the counsel for the defendant agreed as follows:

- (1) That the issue as to whether or not the defendant was justified in terminating the contract between the plaintiff and the defendant, that is to say, whether or not there was a prior breach of the said contract by the plaintiff justifying the defendant to terminate the agreement be first enquired into and determined by the court;
- (2) That the onus of justifying the termination of the said contract was upon the defendant; and
- (3) That the question of damages, if any, be determined thereafter.

In compliance with the terms of the above agreement, evidence called for the defendant, who accordingly began, and thereafter for the plaintiff, was limited to the issue as to whether or not the defendant was justified in terminating the contract between it and the plaintiff.

The facts which emerged from the evidence do not appear to be in dispute, and may be summarised as follows: On April 12, 1962 the agreement, Ex. A, was entered into and executed by and between the plaintiff and the defendant,

whereby, subject to the terms and conditions therein contained, the defendant was to sell and the plaintiff to purchase 660 gallons of sweet clean milk daily with effect from March 1, 1962, continuing thereafter until the agreement was terminated in accordance with the provisions in the said agreement contained.

On the execution of the said agreement and thereafter, both the plaintiff and the defendant observed and performed strictly and regularly the terms thereof. In exercise of its right under the provisions of cl. 15 of the agreement aforesaid, it became necessary from time to time for the defendant, its agents and servants to inspect the plaintiff's business premises for the purpose of ensuring that its cold storage arrangements and installations were adequate and being efficiently and properly operated and maintained.

Sometime in 1963 it came to the knowledge of the Uganda Creameries, Ltd., a subsidiary and agent of the defendant in Uganda, that the "Winpack" milk from Turbo in Kenya was coming to the market in Uganda in competition with the defendant's milk. Such an eventuality was viewed with serious concern by the defendant, which then promptly took steps to organise against the new competitor. A meeting of all the retailer customers, including the plaintiff, on special contract with the defendant was held. It was thereat decided and unanimously agreed that no assistance be accorded the distribution of the "Winpack" milk and that the competitor be combated and, if possible, kept out of the market in Uganda.

On June 19, 1963 Kantibhai Patel (P.W.3) then an agent for the distribution of "Winpack" milk in Uganda, approached the plaintiff. He sought and obtained permission to store his "Winpack" milk in the plaintiff's cold storage under the pretext that his cold storage had broken down. Accordingly he stored the "Winpack" milk in a meat cold storage belonging to the plaintiff.

On June 20 and 21, 1963, respectively in the usual course of inspection, quantities of "Winpack" milk were found in the premises of the plaintiff; and in particular, on June 21, 1963 in the early hours of the morning some tins of "Winpack" milk were seen being loaded into an Opel car by an Asian, who on seeing the representatives of the defendant, drove the car away. The incidents were immediately reported to the defendant, which, in consequence, by its letter, Ex. B, terminated its agreement with the plaintiff. Wherefore the plaintiff brought this action claiming damages as stated above.

On the evidence thus briefly summarised, the question for consideration and determination by the court is as to whether the storage of Kantibhai Patel's (P.W.3) "Winpack" milk in the cold storage of the plaintiff for two days constituted a breach of the provisions of cl. 16 (c) of the agreement, Ex. A, which would entitle the defendant to terminate the agreement in the manner in which it was done.

In his address counsel for the plaintiff, submitted that the agreement, Ex. A, was a contract of sale, that is to say, an agreement to sell and buy goods; for, under it the defendant was to sell to the plaintiff and the plaintiff to purchase from the defendant a certain quantity of milk daily at a fixed price. By the terms of the agreement, on delivery to the plaintiff the milk became the property of the plaintiff as the buyer. Therefore, it was submitted, that for the proper construction of the agreement, Ex. A, the word "take" in cl. 16 (c) of the said agreement must mean within the context of the said agreement "purchase" or "take with the intention to resell", and not merely "to store" as has been disclosed by the evidence was done by the plaintiff. It was further submitted that merely to allow Kantibhai Patel "to store" his "Winpack" milk in the plaintiff's cold storage did not constitute a breach of the provisions of cl. 16 (c) of the agreement, Ex. A; and therefore could not entitle the defendant to terminate

the agreement, The defendant was therefore wrong to have determined the contract with the plaintiff in the manner in which it did it.

For the defendant, it was submitted by counsel that by storing the “Winpack” milk the plaintiff did “take” the milk for storage and for distribution in the market and therefore committed a breach of the provisions of cl. 16 (c) of the agreement, Ex. A. The word “take” in cl. 16 (c) of the agreement, it was argued, must mean “take with a view to storage and distribution”, and not merely “take by way of purchase”, because, it was contended, the storage of the milk was an essential prerequisite to the distribution of the milk in the market. The defendant was therefore entitled and justified to have treated such storage of the “Winpack” milk as a breach of contract; and was thereupon entitled to terminate the agreement by its letter, Ex. B.

As the decision of the court must turn on the construction of cl. 16 (c) of the agreement, Ex. A, I turn now to consider these submissions. The agreement, Ex. A, I turn now to consider these submissions. The agreement, Ex. A, the subject-matter of the action is headed: “Retailer Milk Contract”, and for the purpose of this judgment only that part of the provisions of cl. 1, which I consider material to the issue in controversy, and the whole of cl. 16 (c) are set out hereunder:

Clause 1 provides:

“K.C.C. (Kenya Cooperative Creameries, Ltd.) shall sell and the purchaser (i.e. Universal Cold Storage, Ltd.) shall purchase 660 gallons of sweet clean milk (hereinafter called ‘the daily quantity’) daily with effect from the 1st day of March, 1962, continuing thereafter until this agreement is terminated under the provisions hereinafter contained. Provided that the daily quantity may be varied in accordance with the following provisions, etc., etc. . . .”

and cl. 16 (c) provides:

“ In any of the events following that is to say:

- (a) if the purchaser makes default in payment of any sum or any part thereof due to K.C.C. under cl. 6 hereof; or
- (b) if the purchaser fails to comply with the provisions of cl. 7 hereof; or
- (c) if without the written consent of K.C.C. the purchaser takes milk from any person other than K.C.C. at a time when K.C.C. is able and willing to deliver to the purchaser such quantity of milk as the purchaser requires.”

It is obvious from the provisions of cl. 1 above that the agreement is one for the sale and purchase of milk. By the terms of the agreement, the defendant undertook to sell and delivery to the plaintiff and the plaintiff similarly undertook to purchase and take delivery from the defendant at specified delivery points and also at a fixed price 660 gallons of milk daily.

In cl. 5 of the agreement. Ex. A, it is specifically provided that the property and risk in the milk sold and delivered “shall pass from K.C.C. to the purchaser at the time when the said milk shall arrive at the delivery points specified in the fourth column of the said first schedule except in the case of milk delivered at Kampala station, in which event the property and risk in the same shall pass within one hour of arrival at the said station or at the time of collection by the purchaser, whichever be the earlier.”

Now the question is, what is the meaning of the word “take” in cl. 16 (c) of the agreement, Ex. A? Does it mean “purchase” or “take with the intention to resell” as contended by the counsel for the plaintiff; or as contended by the counsel for the defendant “to take for the purpose of storage with a view

to

distribution”? If distribution, by whom? Could it mean distribution by someone other than the plaintiff?

The document, Ex. A, is a commercial agreement. The primary purpose of it was to regulate the commercial relationship between the plaintiff and the defendant as purchaser and vendor respectively. From its terms the defendant is a producer and vendor of milk and the plaintiff a purchaser, retailer and distributor of the said milk. The word “take” must, in my view, be read within the context and the spirit and intendment not only of cl. 16 but also of the whole of the agreement, Ex. A. The purpose of the whole agreement must be considered.

In order to determine whether or not the plaintiff had “taken” milk within the meaning and intendment of cl. 16 (c) of the agreement, Ex. A, it is necessary, I think, to enquire into the purpose of such taking. For the “taking” to come within the meaning envisaged in cl. 16 it seems that it ought to be such “taking” as would fulfil the purpose of the agreement, Ex. A. It must be in furtherance of the object of the agreement.

To ascertain the true meaning of the word “take” in cl. 16 (c) of the agreement, Ex. A, it is essential to discover from the agreement itself the true intention of the parties in including the clause in the agreement, and the true object and purpose of the clause. As can be gathered from the agreement itself the purpose of the provision of cl. 16 (c) would appear to be to prevent the plaintiff from “taking” in the sense of buying milk from any other milk dealer or producer or vendor while still dealing with the K.C.C. and while the K.C.C. is still able and willing to supply the plaintiff with such milk. The consequences which must flow from the provision must be to prevent the plaintiff from dealing with or buying milk from any other milk producer or vendor to the detriment of the K.C.C., for such a dealing would mean a loss of business to the K.C.C.

A careful analysis of cl. 16 (c) of the agreement discloses that the word “take” in the clause is seriously qualified and restricted in its meaning by the word “requires”, which is the last word in the clause. The word “requires”, it seems to me, clearly defines and restricts the milk which must be taken by the plaintiff in order to commit a breach of the clause. In terms of the provisions of cl. 16 (c) of the agreement, such milk ought to be milk which the purchaser requires, the quantity of which the K.C.C. is able and willing to deliver to the purchaser. If therefore it is milk which the purchaser requires, such milk must be required for the purposes of the purchaser and not otherwise. There can be no “taking” of milk not required.

The question then is, can milk which the plaintiff merely permits someone else to store in its cold storage be properly and accurately described as milk which the plaintiff as purchaser requires? I think not. I am of the view that according to the terms of cl. 16 (c) of the agreement, Ex. A, the plaintiff can only properly be said to “take” milk when such milk is milk which it requires in the interests and for the purpose and in furtherance and in fulfilment of its business commitments as a retailer and distributor of milk. It seems to me that it cannot be otherwise. For merely “taking” milk and storing the same in the cold storage of the plaintiff without using the said milk in any way connected with the business undertaking of the plaintiff would not, in my view, amount to “taking” within the context and intendment of c. 16 (c) of the agreement.

On June 21, 1963 in terminating the plaintiff’s contract the defendant wrote as follows:

“Retailer contract

We wish to advise you that the above mentioned contract is cancelled forthwith. We are taking this step as it has been proved to our satisfaction

that you have acted in breach of cl. 16 (c) of the contract. Our decision is also influenced by the fact that in the past we have had considerable trouble with your account over questions of containers, payment of your account, the condition of your cold store, and other matters.

In view of the foregoing no further supplies of our milk will be available to you.

We would be pleased if you would return all milk containers a present on charge to you.

To give you sufficient time to return all containers a balance will be struck on your account as at close of business on June 30, 1963.”

From the terms of the above letter, it is clear that the defendant had claimed to have terminated the contract because the plaintiff had acted in breach of cl. 16 (c) of the agreement, Ex. A. There were also allegations concerning the accounts, the condition of the plaintiff’s cold stores and containers. I think it will be sufficient to observe that, throughout the hearing of this case, no evidence has been given to justify the allegation that the defendant had had considerable trouble over the plaintiff’s accounts or over the condition of its cold storage or its containers.

Having regard to the view which I take as to the true and correct construction and meaning of the word “take” in cl. 16 (c) of the agreement, Ex. A, I hold that by permitting Kantibhai Patel (P.W.3) to store his milk in the plaintiff’s cold storage, the plaintiff did not in any way commit a breach of the provisions of cl. 16 (c) of the agreement. I must therefore conclude that the defendant has failed to satisfy me that it was justified in terminating its contract with the plaintiff. I am of the opinion that the defendant, in so terminating the contract, was most high-handed and wrong as it did not even trouble to bring to the notice of the plaintiff any alleged lapse on its part, nor was there any enquiry undertaken by the defendant to ascertain the true position. In so terminating the contract, I hold that the defendant has committed a breach of the said contract in that no notice in terms of cl. 17 of the agreement, Ex. A, was given to the plaintiff. Accordingly this action succeeds.

Judgment for the plaintiff.

For the plaintiff:

Ishani & Ishani, Kampala

P. J. Wilkinson, Q.C. and A. Ishani

For the defendant:

Russell & Co., Kampala

R. E. G. Russell

W Tassan and Two Others v Hooseni Sisal Estate Ltd **[1964] 1 EA 726 (HCT)**

Division:	High Court of Tanganyika at Dar-es-Salaam
Date of judgment:	7 August 1964
Case Number:	7/1964
Before:	Weston J

[1] Rent restriction – Application for increase in rent by landlord – Special circumstances – Standard rent assessed in 1953 exceeding rent prevailing on prescribed date – Increase of standard rent subsequently allowed by Board – Whether any evidence of “special circumstances” – Objects of rent restriction legislation.

Editor’s Summary

In 1964 the respondent company as landlord of a building comprising eight flats made three separate applications, subsequently consolidated, to the Rent Restriction Board to determine the standard rents of flats B, E and F. At the “prescribed date” flats B and F were let at rents of Shs. 550/- per month and Shs. 400/- per month respectively while Flat E was unlet and in 1962 the two flats were let at a higher rent. Flat E was in 1960 let at Shs. 350/- later raised to Shs. 375/-. In 1953, under the relevant legislation then in force, the standard rent of flat B had been determined at Shs. 800/- per month and those of flats E and F at Shs. 729/- per month. In 1959 the rates in respect of all eight flats amounted to Shs. 1,000/- per annum and these had risen by 1964 to Shs. 2,000/- per annum. Before the Board counsel for the respondent made it clear that the “applications to fix the standard rents were based on special circumstances which the Board can take into account” pursuant to s. 4(2)(a) of the Rent Restriction Act, 1962. The Board in its decision increased the standard rents of flats E and F to Shs. 739/42 per month and of flat B to 810/42 per month on the grounds that it was satisfied that the standard rent assessed in 1953 was reasonable; that since 1953 costs and site rates had increased very substantially; that when the three flats were let at the “prescribed date” the rent charged was a low rent due to a depression and that it would be inequitable to take those figures as the starting point for assessing the standard rent in 1964 and particularly that the usual rental for flats in the vicinity was at the very least Shs. 700/- per month in 1964. The Board accordingly held that the standard rent of the three flats should be determined at the standard rents which were determined in 1953 plus the proportionate increase in site rates. On appeal,

Held –

- (i) the Board had erred in law in treating the grounds on which it relied as “special circumstances” within s. 4(2)(a) of the Rent Restriction Act, 1962;
- (ii) the clear intention of the legislature was to maintain rents at the level prevailing on the “prescribed date”; it was not for the Board to question the economics or the reasonableness of any such rent, and it was this rent which was “the basis on which it should work”; any standard rent determined prior to the prescribed date under the Rent Restriction Ordinance was irrelevant in this context.

Appeal allowed. Order of the Board set aside. Applications remitted to the Board with directions again to determine the standard rent.

Judgment

Weston J: Dawoodbhai Mansions, 74 Kingsway, Dar-es-Salaam, is a block of eight flats, four of which are larger than the remaining

four. The respondent company here is the landlord and was the applicant before the Rent Restriction Board of Dar-es-Salaam in three several applications to the Board to determine the standard rent of one of the larger flats (Application No. 53 of 1964) and two of the smaller flats (Application Nos. 52 and 54 of 1964). The three applications were consolidated and considered together by the Board which handed down one decision, and it is from that decision that the three tenants in occupation affected now join in this appeal.

The facts are few, simple, and not in dispute.

Dawoodbhai Mansions was in existence at the prescribed date, and it appears – despite averments in the pleadings filed by the several tenants which seemed to indicate that there would be controversy-it appears, I say, to have been made common ground in the proceedings before the Board that on that date (a) the smaller flat which was the subject matter of Application No. 52 of 1964 and to which I will refer hereinafter as “flat F”, was let at a rent of Shs. 400/- per month, (b) the larger flat which was the subject matter of Application No. 53 of 1964 and to which I will refer hereinafter as “flat B”, was let at a rent of Shs. 550/- per month, and (c) the smaller flat which was the subject matter of Application No. 54 of 1964 and to which I will refer hereinafter as “flat E”, was standing vacant, unlet.

The tenant of flat F, Mr. W. Tassan, the first of the three appellants here, went into occupation on June 1, 1962 at a rent of Shs. 650/- per month. Before the institution of proceedings before the Board the respondent had refunded to him all monies paid by way of rent in excess of a rent calculated at the rate of Shs. 400/- per month. The tenant of flat B, the Oriental Fire and General Insurance Co., Ltd., the second of the three appellants here, went into occupation on July 1, 1962 at a rent of Shs. 800/- per month. Similarly, before the institution of proceedings before the Board the respondent had refunded to him all monies paid by way of rent in excess of a rent calculated at the rate of Shs. 550/- per month. The tenant of flat E, Mr. A. J. Fernandes, the third of the three appellants here, went into occupation in October, 1960 at a rent of Shs. 350/- per month which was, after six months, raised to Shs. 375/- per month.

In 1953, under the relevant legislation then in force, the standard rent of flat B had been determined at Shs. 800/- per month and that of flat F and flat E at Shs. 729/- per month.

In 1959 the rates in respect of all eight flats amounted to Shs. 1,000/- per annum, and these had risen since then to Shs. 2,000/- per annum as at the date of the applications.

So much for the facts, and I think it will make for clarity if I now set out the relevant provisions of the Rent Restriction Act, 1962. By s. 4 (1) it is provided that:

“The expression ‘standard rent’ in relation to any premises means:

- (a) a rent determined by a Board to be the rent at which the premises were let at the prescribed date; . . .
- (b) where the premises were in existence but were not let at the prescribed date and were or are subsequently let, a rent to be assessed by a Board as the rent at which such premises would reasonably have been let at the prescribed date having regard to the rents at which premises (being premises to which the provisions of the Rent Restriction Ordinance applied) of a similar character in the neighbourhood were let at the prescribed date.”

Subsection (2) of this section reads:

“Notwithstanding anything contained in the foregoing provisions of this section:

- (a) in the case of any premises in regard to which a Board is satisfied that in the special circumstances of the case it would be fair and reasonable to alter whether by way of increase or reduction the amount of the standard rent as ascertained in accordance with sub-section (1), the Board may assess the standard rent of such premises at such figure as the Board shall in all the circumstances of the case consider reasonable;
- (b) in the case of any premises in regard to which a Board is satisfied that it is not reasonably practicable to obtain sufficient evidence to ascertain the rent at which such premises were let at the prescribed date, or that the rent at the prescribed date was a nominal, fictitious or collusive rent, the Board shall have power to determine the rent at the prescribed date as being of such amount as the Board thinks proper having regard to the rents at which premises of a similar character in the neighbourhood were let at the prescribed date.

* * * *

For the purposes of para. (a), ‘special circumstances’ shall include but shall not be restricted to:

- (i) the temporary nature of the construction of the premises concerned or the temporary nature of the lease or licence under which the land on which the premises are situate is held, or the fact that the premises can be expected to be let only during a certain period of the year, as a result of which foregoing factors the standard rent as defined in subsection (1) would yield an uneconomic return to the landlord;
- (ii) any change in the size of character of the premises, or any expenditure incurred by the landlord on substantial improvements or structural alterations to the premises, other than for ordinary or necessary repairs, or on substantial improvements made to any land on which the premises are erected or to any roadway adjacent to such land other than for necessary maintenance and drainage, or in providing a suitable water supply or sewerage system or the extension of such a water supply or sewerage system from which the tenant derives benefit;
- (iii) any case where the rates payable by the landlord at any time are less than the rates which were payable by the landlord at the time when the premises were let to the tenant.”

Counsel for the respondent, made it quite clear to the Board that the respondent’s “applications were based on special circumstances which the Board can take into account”. Learned counsel then, was undoubtedly moving the Board to exercise its powers under s. 4(2)(a) of the Act, and I will refer later to the nature and effect of this approach.

In its decision, after quoting from a previous decision of its own (Case No. 96 of 1962) in which the Board had laid down the principle that in applications under the Rent Restriction Act, 1962, for determination of the standard rent of premises in respect of which a standard rent had been determined under the Rent Restriction Ordinance, “the basis on which we should work is whatever the proper maximum rent was at that time” – meaning, as I understand it, whatever the standard rent under the old law was on July 1, 1959 – the Board said:

“The Board is quite satisfied that the standard rent assessed in 1953

in respect of the eight flats in the suit premises was reasonable. The Board also feels that the decision in case No. 96 of 1962 is a correct decision and agrees entirely with reasoning of the paragraphs quoted above.

Quite apart from the case above referred the Board is aware that the usual rental per month for flats in the vicinity of Selander Bridge and Kingsway is at the very least Shs. 700/- per month and upwards. The Board further takes into consideration that since the date the premises were assessed in 1953 costs have increased very substantially and rents have likewise increased as well as site rates.

The Board is satisfied that when the three flats in cases Nos. 52-54 of 1964 were let at the prescribed date the rent charged was a low rent due to the depression and that it would be inequitable to take those figures as the starting point for assessing the standard rent today. Particularly in view of the rents paid for similar premises in the immediate vicinity.

Accordingly the Board is of the opinion that the standard rent in applications Nos. 52-54 of 1964 should be determined at the standard rents which were determined in 1953 plus the proportionate increase in site rates. In 1959 the site rates for the eight flats were Shs. 1,000/- today they are Shs. 2,000/-, i.e., an increase of Shs. 10/42 per flat per month."

The Board then made the following order:

- "1. The standard rent in application No. 52 of 1964 is hereby determined at Shs. 739/42 per month with effect from February 1, 1964.
2. The standard rent in case No. 53 of 1964 is hereby determined at Shs. 810/42 per month with effect from February 1, 1964.
3. The standard rent in case No. 54 of 1964 is hereby determined at Shs. 739/42 per month with effect from February 1, 1964.
4. The respondents in each of the three cases 52, 53 and 54 of 1964 to pay to the applicant company the cost of these cases assessed at Shs. 200/- per case."

With respect, this decision of the Board was in my view founded on a wrong principle and cannot be sustained in law. As to principle, and confining myself to the determination under the Rent Restriction Act of the standard rent of unfurnished premises in existence on the prescribed date, the clear intention of the legislature is to maintain rents at the level prevailing on that date. To this end, provision is made to restrict the increase of any rent that was in fact being paid on that date (see s. 4(1)(a)), or where that rent was a nominal, fictitious or collusive rent, or where it is not reasonably practicable to ascertain what rent was being paid (see s. 4(2)(b)), or where any premises were not let at that date so that no rent was in fact being paid (see s. 4(1)(b)), the rent that a landlord could reasonably have obtained on that date. The maintenance of this level is the principal object of the Act and it is the first duty of a Board to ensure that this object is achieved. It is not for a Board to question the economics or the reasonableness of any such rent in the first place, and it is that rent which, to use the Board's expression, is "the basis on which it should work". Any standard rent determined prior to the prescribed date under the Rent Restriction Ordinance is irrelevant in this context.

As I have said, in respect of all three flats learned counsel for the respondent moved the Board under s. 4(2)(a), and I think it necessary, in view of the course which the proceedings before the Board took, that it should be kept clearly in mind what this amounted to in point of law, having regard to the facts before the Board and in particular the fact that the respondent had, as we have seen, refunded all rent taken in excess of the rent that was payable

on July 1, 1959. In the first place, it was an admission (i) that the standard rent of flat F was, by virtue of s. 4(1)(a) of the Act, Shs. 400/- per month, (ii) that the standard rent of flat B was, by virtue of the same provision, Shs. 550/- per month, and (iii) that the standard rent of flat E was, by virtue of s. 4(1)(b) of the Act, such rent as might be assessed by the Board as the rent at which that flat would reasonably have been let at the prescribed date having regard to the rents at which premises (being premises to which the provisions of the Rent Restriction Ordinance applied) or a similar character in the neighbourhood were let at the prescribed date. In the second place, it was an averment that there were present in relation to each of the flats special circumstances which would make it fair and reasonable for the Board to alter these standard rents to such figures as the Board might in all the circumstances of the case consider reasonable.

With respect, the Board failed to appreciate that this was the respondent's case. The adoption by the Board of the principle that "the basis on which we should work is whatever the proper maximum rent was on July 1, 1959" resulted in it treating the respondent's admission as to the standard rent of the flats as irrelevant, when for reasons which I have already stated it was basic, and as the material passage from its decision which I have quoted makes plain, the Board, if I may say so, failed to notice that the respondent had not adduced any evidence in support of his averment that there were special circumstances which would make it proper for the Board to alter such standard rents.

The Act does not define the expression "special circumstances" but it does give examples: see s. 4(2)(i)(ii)(iii). For my part, and despite respondent's counsel's most persuasive argument, I cannot find evidence of any circumstances that can properly be described as special. It seems to me that the circumstance "that the usual rental per month for flats in the vicinity of Selander Bridge and Kingsway is at the very least Shs. 700/- per month and upwards" today – which I presume is what the Board means – is quite irrelevant; for, as I have said, the intention of the legislature is to maintain the level of rents that were payable or could have been obtained on the prescribed date. Again, the Board in my opinion erred in law in taking "into consideration that since the date the premises were assessed in 1953 costs have increased very substantially and rents have likewise increased as well as site rates". Section 4(2)(iii) of the Act makes it abundantly clear that any decrease in rates is a special circumstance available presumably to a tenant, but an increase can only avail a landlord under s. 16 of the Act. And lastly, the Board considered that "when the three flats in cases No. 52-54 of 1964 were let at the prescribed date the rent charged was a low rent due to the depression". There was no evidence before the Board of any recession and I assume that the Board took judicial notice of a slump at about the prescribed date. Quite apart from the fact that a depression seems to me to be the very reverse of a special circumstance, for it is in the nature of depressions that they are general in their effect, if indeed the legislature saw fit to fix a prescribed date in the middle of a slump – which I doubt – it is not for the Board to redress the balance in favour of landlords.

Accordingly, this appeal must succeed. The order of the Board will be set aside and the applications will be remitted to the Board, whom I direct:

1. In Application No. 52 of 1964, to determine the standard rent at Shs. 400/- per month plus any permitted increase under s. 16 of the Act, with effect from February 1, 1964.
2. In Application No. 53 of 1964, to determine the standard rent at Shs. 550/- per month plus any permitted increase under s. 16 of the Act, with effect from February 1, 1964.
3. In Application No. 54 of 1964, to determine the standard rent at the

rent at which the premises would reasonably have been let at the prescribed date, having regard to the rents at which premises (being premises to which the provisions of the Rent Restriction Ordinance applied) of a similar character in the neighbourhood were let at the prescribed date, plus any permitted increase under s. 16 of the Act, with effect from February 1, 1964.

The costs in the proceedings before the Board, assessed at Shs. 200/- in the case of each application, will be paid by the respondent, as well as the costs of this appeal.

Appeal allowed. Order of the Board set aside. Application remitted to the Board with directions again to determine the standard rent.

For the appellants:

K. L. Javeri and G. S. Patel, Dar-es-Salaam

For the respondent:

A. Roden, Dar-es-Salaam

Re An Application By G N M Mallo [1964] 1 EA 731 (HCU)

Division:	High Court of Uganda at Kampala
Date of judgment:	19 August 1964
Case Number:	46/1964
Before:	Sheridan J
Sourced by:	LawAfrica

[1] Land registration – Mailo land – Forged transfer – Land mortgaged – Sale by auction by mortgagee – Caveat entered for heirs of original registered proprietor – Claim that transfer from original proprietor forged – Land twice transferred since forged transfer – No allegation of fraud between present proprietor and mortgagee – Effect of registration of mortgage – Registration of Titles Ordinance (Cap. 123), s. 145, and s. 184 [U].

Editor's Summary

By notice of motion under s. 149 of the Registration of Titles Ordinance [U.] the applicant sought an order for continuation of a caveat lodged by him in respect of mailo land. The original registered proprietor of the land was B. M. Zimbe but before his death in 1946, his son, C. M. Zimbe, became registered owner in 1941 by transfer at a price of Shs. 700/-. The applicant alleged that this transfer was forged. C. M. Zimbe bequeathed the land to one Jagwe, the applicant's uncle, who for Shs. 100/- transferred it to Nasuna, his sister. Nasuna, the present registered proprietor, mortgaged the land, first, to one, Mrs. T. A. Patel, on May 1, 1962, and, secondly, to C. S. Patel, the respondent on March 7, 1963.

After registration of the first mortgage the applicant lodged a caveat claiming the land on behalf of the heirs of B. M. Zimbe, and on registration of the second mortgage although the Registrar of Titles served the applicant as caveator with a notice under s. 149 of the Ordinance, he took no action within thirty days and the caveat lapsed. On July 1, 1963, His Highness the Kabaka authorised the applicant to represent his deceased father in the matter of B. M. Zimbe's succession, and, on January 6, 1964, the applicant filed an action in the Principal Court against C. M. Zimbe, Jagwe and Nasuna, claiming damages for forging the transfer in 1941. On January 7, 1964, upon hearing that the second mortgagee was selling the land by auction the court authorised the applicant to register a caveat. The applicant sought continuation of the caveat lodged pending determination of the suit for damages in the Principal Court. The respondent opposed the application and relied on the protection given to his registered claim by s. 145 of the Ordinance which, except in the case of fraud, gives the registered proprietor an unimpeachable title.

Held –

- (i) in the absence of fraud and since none of the five specified exceptions applied, production of the registered certificate of title was under s. 184 of the Ordinance an absolute bar to any claim and no intervening fraud or infirmities in the mortgagor's title would make any difference;
- (ii) even if Nasuna had executed the mortgage in the knowledge of Jagwe's fraud, it would still constitute a valid incumbrance in favour of a bona fide mortgagee: *Gibbs v. Messrs. McIntyres & Cresswell* (1) applied.

Application dismissed. Order that the caveat be removed.

Case referred to in judgment:

Gibbs v. Messrs. McIntyres & Cresswell, [1891] A.C. 248.

Judgment

Sheridan J: This is an application by notice of motion under s. 149 of the Registration of Titles Ordinance (Cap. 123) [U.] for the continuation of a caveat lodged by George Mallo and registered on January 16, 1964, as an incumbrance on Mailo Register Vol. Folio 14, 2.88 acres of land at Namirembe, Mengo, Uganda, now known as Block 4, Plots 68, 69, 70 and 71, Kibuga. It is made pursuant to a notice by the Registrar of Titles dated July 13, 1964, under s. 149 (annexure "A" to the applicant's affidavit) stating that the respondent, the second mortgagee, had applied for registration, and requiring him to take the necessary action under the section. The application is opposed by the respondent, C. S. Patel, who was registered on March 7, 1963, as a second mortgagee to secure the repayment of Shs. 17,700/- on August 31, 1963, at the rate of nine per cent. per annum. Previous to that, on May 1, 1962, Mrs. T. A. Patel registered a first mortgage to secure the repayment of Shs. 19,000/- on demand with interest at the rate of 1 1/4 per cent. per month. She is not a party to this application but Mr. D. A. Patel has held a watching brief on her behalf.

There is a somewhat complicated history behind this application which from the affidavits of the applicant and respondent may be summarized as follows.

The original registered proprietor of the land was the Rev. B. M. Zimbe who died in 1946. Before that, on June 11, 1941, C. M. Zimbe, his son, became the registered owner by transfer for Shs. 700/-. The applicant alleges that this was not a genuine transfer and that the signature of B. M. Zimbe and his witness were forged.

C. M. Zimbe died on March 28, 1949. He bequeathed the land to George Jagwe, and on May 3, 1951, he was registered as the proprietor by a certificate of succession. Jagwe is the applicant's uncle. On May 9, 1951, he transferred the land to Florence Nasuna, his sister, for Shs. 100/-. She is the present registered proprietor and it was she who mortgaged the land. The applicant alleges that these transfers are tainted with fraud; he points to the insignificant sums paid for this valuable piece of land and states that Jagwe was convicted by the Principal Court in 1957 for forging the will of B. M. Zimbe. Not surprisingly disputes arose as to the distribution of his estate. Before they were resolved Musa Matuga, the applicant's father, died on October 13, 1962. On July 2, 1962, that is after the first mortgage had been registered, the applicant lodged a caveat on the Register claiming the land on behalf of the heirs of B. M.

Zimbe. When the second mortgage was entered into the Registrar of Titles served the applicant/caveator with a notice under s. 149 of the Ordinance. He took no action within the requisite thirty days and the caveat lapsed and was cancelled when the second mortgage was registered on March 7, 1963.

By a letter dated July 1, 1963 (annexure “B” to the applicant’s affidavit), His Highness the Kabaka authorised the applicant to represent his father in the matter of B. M. Zimbe’s succession, and suspended a decision on it pending the adjudication by the Principal Court. On January 6, 1964, the applicant filed a suit in the Principal Court against C. M. Zimbe, G. Jagwe, and F. Nasuna, claiming Shs. 8,957/- damages for forging the agreement which was registered on June 11, 1941. The suit is still pending but on January 7, 1964, on being informed of a newspaper notice that the second mortgagee was putting the land up for auction on January 17, 1964, the court authorised the applicant to lodge the present caveat which he did on January 16, 1964. There were no bidders and the second mortgagee managed to sell one of the plots by private treaty. It is this transaction which has brought matters to a head. His affidavit avers that the total amount of the mortgages, including interest, now exceeds Shs. 68,000/-, and that unless all the plots are sold his liability to pay off the first mortgagee will go on increasing and his own mortgage will become unrealisable. He points to diminishing land values. In the alternative he asks that if the caveat is to be extended pending the disposal of the suit, that the applicant should give security, as is required by s. 149, by lodging Shs. 68,000/- in court, and by bringing a fresh suit in this court joining the mortgagees, who, as non-Africans, cannot have their interests safeguarded by any order of the Principal Court. Counsel for the applicant, conceded that the mortgages were entered into bona fide and for value and that if the applicant wins the suit in the Principal Court he must redeem them in order to recover the land, but he went on to say that the applicant is unable to give any security or undertaking as (a) he may lose the suit, and (b) he is suing only in a representative capacity. Counsel for the applicant urges that a postponement of the sale pending the outcome of the suit will cause less hardship to the respondent, who has his security, whereas if the land is sold any judgment which he may obtain will be barren.

The respondent relies squarely on the protection which his registered claim is given by s. 145 of the Ordinance, which provides:

“Except in the case of fraud no person contracting or dealing with or taking or proposing to take a transfer from the proprietor of any registered land, lease or mortgage shall be required or in any manner concerned to inquire or ascertain the circumstances in or the consideration for which such proprietor or any previous proprietor thereof was registered, or to see to the application of any purchase or consideration money, or shall be affected by notice actual or constructive of any trust or unregistered interest, any rule of law or equity to the contrary notwithstanding, and the knowledge that any such trust or unregistered interest is in existence shall not of itself be imputed as fraud.”

The definition of “proprietor” in s. 2 includes the owner of a mortgage whose name is entered as the proprietor thereof in the Register. Further, in the absence of fraud and with none of the five specified exceptions applying, s. 184 makes the production of the registered certificate of title, and it has been produced, an absolute bar to any claim. Nor does it make any difference that there may have been intervening fraud, and that there might be infirmities in the mortgagor’s title. This would be so even if Florence Nasuna had executed the mortgage, in the knowledge of George Jagwe’s fraud; it would still constitute a valid incumbrance in favour of a bona fide mortgagee. See *Gibbs v. Messrs. McIntyres & Creswell* (1).

Finally counsel for the respondent, relies on s. 186 of the Ordinance which provides for the payment of compensation to any person deprived of land in consequence of fraud against the person upon whose application such land was erroneously registered. That may be cold comfort to the present applicant, but

nothing can be done for him on this application. The application for the extension of the caveat is dismissed with costs. I order its removal.

Application dismissed. Order that caveat be removed.

For the applicant/caveator:

Dalal & Singh, Kampala

S. H. Dalal

For the first mortgagee:

A. D. Patel, Kampala

S. A. Pinto

For the respondent/second mortgagee:

S. A. Pinto, Kampala

D. A. Patel

Khushaldas and Son Limited v M Weinstein and another
[1964] 1 EA 734 (SCK)

Division:	Supreme Court of Kenya at Nairobi
Date of judgment:	5 February 1964
Case Number:	90/1962
Before:	Miles J
Sourced by:	LawAfrica

[1] Practice – Decree – Compromise – Application for execution – Decree drawn upon compromise incorporating terms outside scope of suit – Judgment by consent of parties – Whether all terms of decree enforceable.

[2] Practice – Execution – Decree following compromise – Application for execution of mortgage – Whether application by motion correct or by chamber summons under O. 21, r. 7 (2) Civil Procedure (Revised) Rules, 1948 [K.].

Editor's Summary

The plaintiff claimed specific performance of an agreement relating to premises known as Plums Hotel in Nairobi and for an order for ejectment and for various sums as arrears of rent. At the hearing judgment was entered on certain terms by consent. These terms were reduced to writing and signed by the advocates for the parties, and also by the judge but not by the parties themselves. Subsequently a decree

was drawn up by the plaintiff's advocates with which the defendants' advocates did not agree so the matter was referred to the judge under O. 20, r. 7 (2) of the Civil Procedure (Revised) Rules, 1948 [K.]. The objections to the draft decree were that it comprised reliefs not claimed in the plaint but the judge held that by virtue of O. 20, r. 6 (1), which provides that the decree shall agree with the judgment, he had no alternative but to approve the decree as drafted. The plaintiff then applied by motion for certain orders in execution of the decree. The application was opposed by the defendants on the ground that the decree contained matters which did not "relate to the suit" within the meaning of O. 24, r. 6. It was not disputed that the decree contained matters which did not form part of the plaint and similarly that what was claimed in the plaint was abandoned and consequently, was not included in the decree, but there was argument whether a decree embodying a compromise, the operative part of which comprised matters extraneous to the suit, could be enforced. Counsel for the defendants also took the preliminary point that the procedure adopted by the defendants, which was by notice of motion, was misconceived. He contended that, as this was an application for execution, the procedure to be followed was that laid down by O. 21, r. 7 (2). Counsel for the plaintiff on the other hand relied, inter alia, on O. 21, r. 28 (1).

Held –

- (i) a decree, which embodies matters not relating to the suit, or which includes matters which although relating to the suit should not be in the operative part of the decree, cannot be challenged in execution proceedings; the decree, therefore, was enforceable;

- (ii) the plaintiff's prayer for execution of a mortgage might be said to come under O. 21, r. 28 (1); this rule was not one of the rules listed in r. 91; accordingly under O. 50, r. 1, a notice of motion appeared to be the correct procedure; in any event, since the procedure was not altogether certain the plaintiff was justified in proceeding by way of notice of motion.

Preliminary objection overruled. Order as prayed.

Cases referred to in judgment:

- (1) *Rani Hemanta Kumari v. Midnapar Zamindari Co. Ltd.* (1919), 46 I.A. 240.
- (2) *Vishmal Sitaram Achat v. Ramchandrar Govind Joshi* (1932), A.I.R. Bom. 466.
- (3) *Mohibullah v. Imani*, (1887), 9 All. 229.
- (4) *The Manager of Sri Meenakshi Derastanam Madura v. Abdul Kasim Sahib* (1907), 30 Mad. 421.
- (5) *Ambalal Chunthabhai Patel v. Somabhai Bakorbhai Patel* (1944), A.I.R. Bom. 46.
- (6) *Jasimuddin Biswas v. Bhuban Jelini* (1907), 34 Cal. 456.

Judgment

Miles J: This is an application for certain orders in execution of a decree, and is made in the following circumstances. The plaintiffs in their plaint claim specific performance of an agreement relating to premises in Nairobi known as Plums Hotel. There are prayers for ejectment and for various sums in respect of arrears of rent.

On May 5, 1963, judgment was entered on certain terms by consent. These terms were reduced to writing and signed by the advocates for the parties, and also by Mayers, J., but not by the parties themselves. It will be necessary to deal later in detail with the terms of the consent judgment and the reliefs claimed in the plaint.

Following upon this a decree was drawn up by the advocates for the plaintiffs. Since the defendant's advocates did not agree with the draft the matter was referred to MAYERS, J., under the provisions of O. 20, r. 7 (2) of the Civil Procedure (Revised) Rules, 1948 [K.]. The draft decree was objected to because it comprised reliefs not claimed in the plaint but Mayers, J., held that by virtue of O. 20, r. 6 (1), which provides that the decree shall agree with the judgment, he had no alternative but to approve the decree as drafted. It is this decree which the applicants now seek to enforce.

The application has been opposed by the defendant's counsel for the defendant's main objection is that this decree contains matters which do not "relate to the suit" within the meaning of O. 24, r. 6. This rule provides:

"Where it is proved to the satisfaction of the court that a suit has been adjusted wholly or in part by any lawful agreement or compromise, or whether the defendant satisfies the plaintiff in respect of the whole or any part of the subject matter of the suit, the court may on the application of the party, order such agreement, compromise, or satisfaction to be recorded, and pass a decree in accordance therewith so far as it relates to the suit."

This rule is substantially the same as O. 23, r. 3 of the Indian Code of Civil Procedure save that in the Indian Code the word "shall" appears instead of "may". The Indian Rule follows the former s. 375 of the

Indian Code of Civil Procedure.

The words “so far as it relates to the suit” have been construed liberally by the Courts of India. The effect of the decisions is summarised in Chitaley’s Code of Civil Procedure (5th Edn.), Vol. 2 at p. 2787:

- “18. ‘Shall pass a decree in accordance therewith so far as it relates to the suit.’ A decree on a compromise under this rule can be passed only so far as it relates to the suit. The question whether a particular term of a petition of compromise relates to the suit must be decided from the frame of the suit, the relief claimed and the relief allowed by the decree on adjustment by lawful agreement. The mutual connection of the different parts of the relief granted by a consent decree is an important element for consideration in each case in deciding whether any portion of the relief is within the scope of the suit. No hard and fast rule can be laid down and each case must be governed by its own facts. The relief granted in a compromise decree need not be confined to the relief prayed for in the plaint. The fact that a compromise relates to property not the subject-matter of the suit is not in all cases decisive of the question whether the compromise does or does not relate to the suit. Where the suit is merely for the recovery of specific properties, the compromise must relate to such properties only. But where the suit is not merely for the recovery of the property, but to establish particular rights, the facts have to be looked at as a whole to decide whether matters that do not relate to the suit have been introduced. In such cases, all terms which form the consideration for the adjustment of the matters in dispute, whether they form the subject-matter of the suit or not, become related to the suit, and can be embodied in the decree.

The following are instances in which the compromise was held to ‘relate to the suit’ within the meaning of this rule:

- (1) The compromise of a suit for a money decree may provide for a charge being created on the defendant’s immovable property for the payment of the amount agreed on.
- (2) The compromise of a suit for a declaration may include a term as to the payment of a sum of money by one of the parties to the others.
- (3) Where one co-tenant who has paid the entire rent of the land sues the other co-tenant for contribution, the suit may be compromised by providing that the defendant should give up his share of the land in favour of the plaintiff.
- (4) Where a suit is for the recovery of certain property, a compromise providing that the defendant should redeem a certain house under mortgage and deliver it to the plaintiff is one relating to the suit.
- (5) A. & B. a lessee from A. sued C. asserting A.’s title to certain land. The suit was compromised by providing that C. the defendant, should recognise the lease granted by A. to B. and that, in consideration for this, was to be entitled to a half-share of the rent paid by B. The compromise was held to be one relating to the suit.”

In the light of this it is necessary to examine the terms of the decree in relation to the reliefs claimed in the plaint.

The first relief claimed in the plaint is specific performance of an agreement contained in paras. 20 to 22 thereof. It is alleged that the defendants agreed in a series of letters (i) to execute a first legal mortgage on plots 13 and 14, section 8, Upper Parklands Estate, Nairobi to secure arrears of rent on Plums Hotel amounting to Shs. 64,027/01 and interest thereon, (ii) that the defendants would pay interest on this sum, (iii) that the sum of Shs. 64,027/01 should be repaid by monthly instalments of Shs. 5,000/-, (iv) that the defendants would enter into

a lease of premises plot No. 209/66/39 for a period of 14 years from January 1, 1956. It will be convenient to refer to these premises as “the annexe”. There were certain other terms which are of less importance.

The plaintiff claimed (2) Shs. 64,027/01 in the alternative and (3) An order for ejectment of the defendants from plots Nos. 209/67/4 and 209/67/5 – this may be referred to as the main building.

- (4) The sum of Shs. 43,154/14 being arrears of rent and other charges in respect of the main building from June 1 to December 15, 1961.

The consent decree provided:

1. That the defendants should pay the plaintiffs the sum of Shs. 255,000/- being agreed arrears of rent for the period until March 31, 1963. The difference here from the plaintiff is that the sum of Shs. 64,027/01 comprises only rents due up to March 31, 1961.
2. The defendants agreed to pay this sum by certain instalments.
3. The defendants were to secure the sum of Shs. 255,000/- by a first legal mortgage on plot Nos. 13 and 14, section 7, Upper Parklands Estate, Nairobi. The only difference here from the plaintiff is the amount to be secured by the mortgage.
4. The defendants were to surrender their present lease of the main building which was due to expire on March 31, 1966, and to take a new lease for ten years from April 1, 1961. There were certain furniture, fittings and other chattels to be agreed between the parties.
5. The rent was to be Shs. 10,000/- per month and the lease was to contain certain terms and conditions.
6. The defendants were to hand over to the plaintiff vacant possession of the annexe.

The provision for the surrender of the lease of the main building and the acceptance of a new lease departed from the plaintiff since there was no claim for specific performance of an agreement to take a lease of the main building. The claim for specific performance of the agreement to take a lease of the annexe is abandoned. It seems to me clear, however, when one looks at the terms of this decree as a whole, that what may be termed the extraneous matters were part of the consideration for the compromise. The defendants were being allowed to remain in possession of the main building in respect of which there was a claim in the plaintiff for ejectment. All the terms of the consent judgment were inextricably interwoven and it seems to me that, without straining the language of O. 24, r. 6 all the terms of the decree “related to the suit”, as that term has been construed by the courts of India.

This does not dispose of the matter because it does not follow that a decree embodying a compromise which relates to the suit can be enforced in its entirety by execution. This question was dealt with by the Privy Council in the case of *Rani Hemanta Kumari Debi v. Midnapur Zamindari Co. Ltd.* (1). The facts in that case were that there had been a compromise between the plaintiff and the defendant and amongst other terms of the compromise was one that if the plaintiff succeeded in obtaining a decree against the Government in respect of certain lands which were not the subject matter of the suit, she would grant a lease of them to the defendants on the same conditions as those agreed to with land in his possession. Subsequently, although the plaintiff succeeded in the suit against the Government, she refused to grant a lease to the defendants, who filed a suit for specific performance of the agreement. The main question which was raised in the trial court was whether the consent decree was inadmissible in evidence for want of registration, but in the course of the judgment

the Privy Council referred to s. 375 of the Civil Procedure Code of 1882. Their Lordships state ((1919) 46 I.A. at p. 246):

“The terms of this section need careful scrutiny. In the first place, it is plain that the agreement or compromise, in whole and not in part, is to be recorded, and the decree is then to confine its operation to so much of the subject-matter of the suit as is dealt with by the agreement. Their Lordships are not aware of the exact system by which documents are recorded in the courts of India, but a perfectly proper and effectual method of carrying out the terms of this section would be for the decree to recite the whole of the agreement and then to conclude with an order relative to that part that was the subject of the suit, or it could introduce the agreement in a schedule to the decree; but in either case, although the operative part of the decree would be properly confined to the actual subject-matter of the then existing litigation, the decree taken as a whole would include the agreement. This in fact is what the decree did in the present case. It may be that as a decree it was incapable of being executed outside the lands of the suit, but that does not prevent it being received in evidence of its contents.”

It is true that these observations may strictly be regarded as obiter but they were followed by the Supreme Court of Bombay in the case of *Vishmal Sitaram Achat v. Ramchandra Govind Joshi* (2). In this case the court said that the proper and effectual method of carrying out the terms of the compromise under O. 23, r. 3 is for the decree to recite the whole of the agreement and then to conclude with an order relevant to that part that is the subject of the suit, or to introduce the agreement in a schedule to the decree, but the operation of the decree should be confined to the subject matter of the suit. The operative part of the decree so confined to the subject matter of the suit can be enforced as between the parties by execution and the agreement as to matters extraneous to the suit can be enforced in a separate suit.

What is the position, however, if, as in the instant case, the operative part of the decree comprises matters which are extraneous to the suit? On this point there is to a certain extent a conflict of authority in the Indian Courts. The High Courts of Madras, Allahabad, Lahore, Bombay and Patna and the Chief Court of Oudh have held that the executing court cannot refuse to execute the decree in such a case, the reason being that an objection to the decree cannot be raised in the executing court but must be taken by way of appeal. In *Mohibullah v. Imani* (3) an action was brought to obtain possession of certain lands which under an agreement for compromise the defendant had agreed should be decreed to the plaintiff in a previous action. In the previous action the result of the compromise was that the plaintiff obtained a greater quantity of land by the decree than he had originally claimed. The Munsif raised an objection to the drawing up of that decree in accordance with the terms of the compromise on the grounds that the plaintiff was betting more than he claimed. Edge, C.J. stated ((1887), 9 All. at p. 231):

“The Munsif being misled in my judgment as to the law declined to make an order for the larger amount of land mentioned in the decree. Unfortunately the order was not appealed against but the present suit was brought . . . I however throw out this suggestion that the Munsif having made an error in law and having been misled into that error by an objection which had been improperly taken by the defendant may properly in an application for review reconsider the order of April 9, 1885.”

In *The Manager of Sri Meenakshi Derastanam Madura v. Abdul Kasim Sahib* (4) it was clearly held:

“Where a compromise between the parties to a suit embraces matters not relating to the suit and the decree following such compromise gives reliefs which are not unlawful, but which could not have been given in the suit had been decided after trial, any objection to such decree on the ground that it is in contravention of s. 375 of the Code of Civil Procedure, must be taken by way of appeal and not in execution of the decree.”

Both these decisions were prior to the decision of the Privy Council but the effect of that decision was considered in *Ambalal Chunthabhai Patel v. Somabhai Bakorbhai Patel* (5) a case which on its facts bears a close resemblance to the present one. Dealing with the Privy Council decision Lokur, J. stated ((1944), A.I.R. Bom. at p. 49):

“Their lordships intended to point out that it was not proper for a court to allow the operative part of a decree to go beyond the actual subject-matter of the existing litigation, and I do not think that their remark that a decree which infringed that rule might be incapable of being executed outside the land in suit was intended to throw any doubt on the well established view that parties in execution proceedings cannot call in question the validity of the decree. Under O. 23, r. 3. Civil P.C. 1908, the court is bound to record a compromise in accordance with the terms ‘so far as it relates to the suit’. But where the compromise is plainly outside the suit, it is open to the court to refuse to incorporate it in the decree. But as observed by Madgavkar, J. in 33 Bom. L.R. 463 where, however, it is a consideration of the compromise and therefore intimately connected with it, the words ‘relates to the suit’ are wide enough to embrace such a term of the compromise, as for instance, the consideration for the compromise even though this consideration may be entirely outside the scope of the suit and relate to property which was never in question in the suit itself. That case was cited with approval and followed by a Division Bench in 33 Bom. L.R. 1457.”

At p. 50 he states:

“And it may be taken as well settled that the objection that one of the terms of a compromise decree was outside the scope of the suit is not one for the executing court to consider. If the court was not right in including that term in the operative part of the decree, it should have been challenged either by way of review or by way of appeal, but the executing court cannot go behind the decree.”

As previously mentioned the High Court of Calcutta had taken the opposite view and I need only refer to *Jasimuddin Biswas v. Bhuban Jelini* (6). It is somewhat curious that in the whole of the judgment there is no reference to any decided case. This is all the more surprising in view of the numerous authorities in the courts of other States to the contrary.

Counsel for the respondent at one stage in his argument argued that the decree by reason of the fact that it included matters outside the scope of the suit was a nullity, as being passed without jurisdiction. This argument was advanced in the case to which I have just referred and I think I can hardly improve upon the reasons given by Lokur, J. for rejecting it ((1944 A.I.R. Bom. at p. 49):

“But it does not necessarily follow that if the court does not strictly follow this direction, it is acting without jurisdiction. There is a great difference between want of jurisdiction and erroneous exercise of it. It is laid down in 53 Cal. 166 that where a decree presented for execution was made by a court which apparently had not jurisdiction whether pecuniary or territorial or in respect of the judgment debtor’s person, to make the

decree, the executing court is entitled to refuse to execute it on the ground that it was made without jurisdiction. Walmsley, J. who delivered the judgment to the Full Bench, was careful to point out that it was only within these narrow limits that the executing court is authorised to question the validity of a decree.”

It is clear that, although there is a certain degree of conflict of opinion in India, the overwhelming weight of authority is to the effect that a decree, which embodies matters which although relating to the suit should not be placed in the operative part of a decree, cannot be challenged in execution proceedings. I hold therefore that the decree is enforceable.

There is one further point which I should mention. Counsel for the defendants took the preliminary objection that the procedure adopted by the applicants, which is by, notice of motion, was misconceived. Counsel for the defendants’ contention was that this was an application for execution and that the procedure therefore is laid down by O. 21, r. 7 (2). This rule provides:

“Save as otherwise provided by sub-r. (1) or by any other enactment or rule, every application for the execution of a decree shall be in writing, signed by the applicant or his advocate or by some other person proved to the satisfaction of the court to be acquainted with the facts of the case, and shall contain in a tabular form the following particulars.”

The rule then sets out the various matters which are to be comprised in the form. Defendants’ counsel relies upon r. 91 of this Order which lists the various applications which can be made by summons in Chambers and he contends that the only modes in which applications for execution made can be are either by a tabular form under r. 7 (2) or by summons in chambers.

Counsel for the plaintiff stated that he relied on a number of provisions as the foundation for this application. The first is s. 38 of the Civil Procedure Ordinance which provides:

“Subject to such conditions and limitations as may be prescribed, the court may, on the application of the decree-holder, order execution of the decree

- (a) by delivery of any property specifically decreed:
- (b) by attachment and sale, or by sale without attachment, of any property;
- (c) by attachment of debts:
- (d) by arrest and detention in prison of any person;
- (e) by appointing a receiver; or
- (f) in such other manner as the nature of the relief granted may require.”

As defendants’ counsel points out this section does not deal with procedure. The appropriate procedure rule would appear to be O. 7, r. 2.

The next provision upon which plaintiff’s counsel relies is s. 97 which provides that: –

“Nothing in this Ordinance shall be deemed to limit or otherwise effect the inherent power of the court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court.”

If the application were based upon this section it is clear that the correct procedure would be by notice of motion under O. L, r. 1. It might be contended that r. 7(2)(j)(v) is wide enough to cover any reliefs sought by way of execution although that relief might also come within the very wide provisions of s. 97. In para. 2 of the prayer of this motion the applicants ask for orders for committal

defendants in the event of their default in complying with the orders made by the court under prayer 1. The matter is not free from doubt.

Plaintiff's counsel also relies upon s. 98 of the Civil Procedure Code which provides:

"Where any person neglects or refuses to comply with a decree or order directing him to execute any conveyance contract or other document, or to endorse any negotiable instrument, the court may, on such terms and conditions, if any, as it may determine, order that the conveyance, contract or other documents shall be executed or that the negotiable instrument shall be endorsed by such person as the court may nominate for that purpose, and a conveyance, contract, document or instrument so executed or endorsed shall operate and be for all purposes available as if it had been executed or endorsed by the person originally directed to execute or endorse it."

As I interpret this section it applies only to a document which is already in existence.

Counsel for the plaintiffs also relies upon O. 21, r. 20 (1) which provides that:

"When the preliminary measures (if any) required by the foregoing rules have been taken, the court shall, unless it sees cause to the contrary, issue its process for the execution of the decree."

This is a purely general provision and merely provides that the court shall issue execution as soon as the correct procedure has been adopted.

Lastly plaintiff's counsel refers to O. 21, r. 28 (1). This provides:

"Where the party against whom a decree for the specific performance of a contract . . . has been passed, has had an opportunity of obeying the decree, and has wilfully failed to obey it, the decree may be enforced by his detention in prison, or by the attachment of his property or by both."

The question is whether the present case can be regarded as one in which a decree has been passed for the specific performance of a contract. It is true that there is a prayer in the plaint for specific performance of a contract but the consent decree provides for the execution of a lease of property different from that which is the subject matter of the plaint.

There is also a prayer for execution of a mortgage and the subject matter of the mortgage is the same as that in the plaint. The amount for which the mortgage is to be made however is different. I think that that prayer 1(a)(ii) might be said to come under r. 28(1). This rule is not one of the rules listed in r. 91 and therefore under O. L, r. 1 a notice of motion would appear to be the correct procedure. It is to be noted that O. XXI, r. 7 (2) is qualified by the words "save as otherwise provided by sub-r. (1) or by any other enactment or Rule." On the other hand it might be argued that r. 7(2)(j)(v) is wide enough to cover an order under r. 28(1). It is to be noted that one of the rules listed in r. 91 is r. 36 which provides for the examination of the judgment debtor as to his property, which is a mode of execution, so that it would appear that not all modes of execution are covered by O. 21, r. 7(2). The difficulty of using the tabular form in a case such as the present is obvious.

Having regard to the fact that the procedure is not altogether certain I am of opinion that counsel for the plaintiff was justified in proceeding by way of notice of motion, although I appreciate that there is considerable force in the contentions of defendants' counsel. But in any event, even if it could be said that the wrong procedure has been adopted, it is in my opinion only a matter of costs.

The situation is different, of course, where an application is made in chambers which should have been made by notice of motion. In such a case the court could not properly entertain it.

I do not think that there is any difficulty in executing the decree as it stands. There will be an order as prayed in para. 1 of the prayer, but I will hear arguments as to the time within which the defendants are to comply with it. There will be an order that any dispute as to the terms of the lease or mortgage or surrender be settled by a judge in chambers. Under prayer 1 (c) there will be a direction that the account in respect of furniture, fittings and other chattels be taken by the Deputy Registrar and I will hear arguments as to the precise nature of the orders to be made under prayer 2. The costs of this application will be paid by the respondents.

Preliminary objection overruled. Order as prayed.

For the plaintiff:

Satish Guatama, Nairobi

S. C. Gautama

For the defendants:

Kean & Kean, Nairobi

J. M. Nazareth, Q.C. and S. L. Chawla

C M Shah and others v M H Abdulla and another
[1964] 1 EA 742 (SCK)

Division:	Supreme Court of Kenya at Nairobi
Date of judgment:	25 October 1963
Case Number:	115/1959
Before:	Edmonds J
Sourced by:	LawAfrica

[1] Damages – Contract – Delay – Agreement for sale of shop premises – Conveyance to be completed on certain future date – Shop falling vacant before completion – Re-letting by vendor without consulting purchaser – Claim for damages – Conveyance subsequently completed – Vendor’s contention that no claim lies after completion – Whether bona fide contest as to legal rights amounts to wilful delay.

Editor’s Summary

On December 12, 1951, the defendants as vendors of certain land with three shops thereon, agreed with one K. G. as agent for the plaintiffs, the purchasers, for the sale of the premises for Shs. 125,000/- of which Shs. 25,000/- was paid as deposit. The shops were stated to be in the possession of named tenants

who were protected under rent restriction legislation. Completion was to be on before March 31, 1952 and pending completion the purchasers were to be entitled to one-fifth of the "net rent". On February 15, 1952, one of the tenancies was determined by surrender and that shop became vacant. This unexpected event increased the value of the property as a whole by Shs. 18,000/- but the defendants, without consulting the purchasers or K.G. re-let the shop at the same rent to a new tenant which had the effect of restoring the premises to their previous value. The plaintiffs protested that the re-letting was in breach of the contract for sale and called on the defendants either to give vacant possession of one shop on completion, or pay compensation by way of deduction from the purchase price. Litigation followed wherein ultimately the Privy Counsel confirmed the decision of the Court of Appeal for Eastern Africa, which had in effect ordered specific performance of the contract of sale and diminution of the purchase price by Shs. 18,000/-. The conveyance of the property to the plaintiffs was finally executed on May 25, 1959 but, in the meantime, on Jan 22, 1959, the plaintiffs filed this suit saying, inter alia, for (a) a declaration that they were

entitled either by way of damages for breach of contract, or, alternatively, as money had and received to or for their use, a sum equivalent to four-fifths of the net rent of the premises from January 24, 1953 to the date of completion of the sale, and an order for payment of the same and (b) an account of all monies due or to become due from the defendants. The defendants contended that the action was misconceived as there was no express stipulation for compensation in the original agreement of sale if the conveyance was not completed on or before March 31, 1952 and that in the absence of such a stipulation the plaintiffs could not claim damages or compensation after completion of the conveyance; that it was not sufficient for the plaintiffs to prove simple default in completion by that the default was wilful and that in any event a bona fide contest as to the rights of a vendor could not amount to wilful default, and that the loss of rent as the measure of damages would have been in the contemplation of the parties at the time of the agreement.

Held –

- (i) there was no impediment in the fact that the conveyance had been completed to an action by a purchaser for damages for delay;
- (ii) the plaint clearly alleged delay, even though that word was not employed, and the correspondence established beyond any doubt that there was delay which arose through the defendants' conduct;
- (iii) the authorities did not support the proposition that provided a legal contest as to the rights of the parties is genuine and bona fide, even though mistaken, a purchaser may not be compensated for being deprived of the profits of his purchase which he would have received had the sale been completed on the date for completion and which the vendor has received;
- (iv) it must have been in the implied contemplation of both parties that any unreasonable delay by the defendants in completion of the sale would result in loss of rent to the plaintiffs; apart from this, it was a clear inference from the circumstances of the case that the loss of rent represented the damages which might fairly and reasonably be said to arise naturally from such breach;
- (v) the plaintiffs were entitled to a declaration for damages for breach of contract.

Judgment for the plaintiff. Order accordingly.

Cases referred to in judgment:

- (1) *Phillips v. Lamdin*, [1949] 1 All E.R. 770; [1949] 2 K.B. 33.
- (2) *Joliffe v. Baker* (1883), 11 K.B. 255.
- (3) *Palmer v. Johnson* (1884), 13 Q.B. 351.
- (4) *Chinnock v. Ely*, 71 E.R. 447.
- (5) *Jacques v. Millar* (1877), 6 Ch.D. 153.
- (6) *Jones v. Gardiner*, [1902] 1 Ch. 191.
- (7) *Bennett v. Stone*, [1902] 1 Ch. 226.
- (8) *Re Young Harston's Contract* (1886), 31 Ch.D. 168.
- (9) *Re Bayley-Worthington and Cohen's Contract*, [1909] 1 Ch. 648.

- (10) *Hadley v. Baxendale* (1854), 9 Ex. 341.
- (11) *Diamond v. Campbell-Jones*, [1960] 1 All E.R. 583.
- (12) *Engell v. Fitch* (1869), L.R. 4 Q.B. 666.

Judgment

Edmonds J: On December 12, 1951, the defendants, as

vendors, made an agreement in writing with one Khetshi Ghelabhai, as purchaser, who it is alleged by the plaintiffs was acting as their agent, for

“the sale of certain land in Nairobi and three shops thereon for Shs. 125,000/- of which Shs. 25,000/- was paid as deposit. The shops were stated to be in the possession of named tenants, and these tenants were protected under the Rent Restriction legislation. Completion was to be on or before March 31, 1952, and pending completion the buyer was to be entitled to one-fifth of the “net rent”. On February 16, 1952, one of the tenancies was determined by surrender and that shop became vacant. It was duly proved at the trial, and is not now in dispute, that this unexpected event had the effect of increasing the value of the property as a whole by no less than Shs. 18,000/- Without consulting the buyers or their agent the appellants immediately re-let the vacant shop at the same rent to a new tenant. This effectively destroyed the windfall of Shs. 18,000/- by restoring the premises to their previous value. The respondents protested that the reletting was in breach of the appellants’ duty under the contract of sale and called on them either to give vacant possession of one shop on completion, or to pay compensation by way of deduction from the purchase price, if they could not give such vacant possession. The appellants refused to do either of these things. They offered to complete and to give possession subject to the three tenancies, but not otherwise. A considerable time passed, chiefly because the respondents’ original solicitor had been suspended from practice, but by January, 1953 the respective attitudes of the parties were ascertained and the sellers gave the buyers notice to complete by January 31, under threat of rescission and forfeiture of the deposit, making it clear that the completion was to be without either vacant possession of the one shop or compensation for not giving such possession. On January 31, the buyers filed suit in the Supreme Court claiming as relief, under para. (i), specific performance coupled with an order to give vacant possession of the shop in question on completion, or alternatively, under para. (ii), specific performance with a reduction of the purchase price by such amount as might represent the loss caused to the buyers by failure to obtain vacant possession of that shop, such loss to be ascertained by an enquiry as to damages, if necessary.”

I have quoted the above statement of facts from the judgment of Briggs, J.A., (as he then was) in the appeal taken by these parties before the Court of Appeal in Civil Appeal No. 34 of 1954. To continue the history of events leading up to the present action I quote the following extract from the judgment of the Privy Council in the appeal to it from the judgment of the East African Court of Appeal:

“Before the learned judge the purchasers succeeded. Owing to a misunderstanding as to an agreement between counsel judgment was entered for Shs. 18,000/- as damages and not for specific performance with an abatement of the purchase price. This led to a notice of motion for a review of the judgment. This was dismissed and the purchasers by a cross appeal asked for a variation of the judge’s order by substitution of an order for specific performance on payment of the agreement price less the deposit, less the Shs. 18,000/- and less taxed costs. The vendors’ appeal was dismissed and the cross appeal in substance allowed.”

The Privy Council confirmed the decision of the Court of Appeal for Eastern Africa, which in effect order specific performance of the contract of sale and diminution of the purchase price by Shs. 18,000/-.

It was not, however, until May 25, 1959, that conveyance of the property to the plaintiffs was finally executed. In the meantime, however, on January 22, 1959, while the parties’ advocates were still involved in efforts to obtain

execution of the conveyance, the plaintiffs filed this action praying inter alia for:

- “1. A declaration that the plaintiffs are entitled under and by virtue of the said agreement for sale and in the events which have happened to be paid by the defendants either by way of damages for breach of contract or alternatively as money had and received to or for the use of the plaintiffs a sum equivalent to four-fifths of the amount of the net rent issuing out of the said premises from January 24, 1953, to the date of completion of the said sale; and an order for payment of such damages or money.
2. An account of all monies now due or to become due to the plaintiffs by the defendants as aforesaid.”

In simple form, the plaintiffs' claim is for four-fifths of the rents which they say they have been kept out of from January 24, 1953, which they allege is the latest reasonable date by which the defendants could or should have completed the conveyance of the property, until May 25, 1959, the date on which the defendants did, in fact, complete the conveyance. A number of issues were raised on the pleadings. Some of these have already been decided on preliminary submissions for the parties, while other allegations by the plaintiffs and not admitted by the defence, notably that Khetshi Ghelabhai was acting in the purchase of the property as the agent of the plaintiffs, are now conceded by the defendants. The only issue now before me, stated in general terms, is whether the plaintiffs are entitled to the relief claimed by them.

It is contended for the defendants that this action is misconceived as there is no express stipulation in the original agreement of sale between the parties that in the event of the conveyance not being completed on or before March 31, 1952, the defaulting party will compensate the other, and that, in the absence of such a stipulation, it is not possible for the plaintiffs to bring a claim for damages or compensation after completion of the conveyance. For the plaintiffs it is contended that by virtue of their advocates' letters of May 4 and 20, 1959, the taking by the plaintiffs of the steps necessary to complete the conveyance was without prejudice to their claim against the defendants for damages for delay in completion of the sale contrary to cl. 6 of the original agreement, which stipulated that the contract was to be performed on or before March 31, 1952. It is further contended that the case of *Phillips v. Lamdin* (1) makes it clear that a claim for damages for breach of contract for the sale of land can be entertained after completion of the conveyance. The facts in that case have a marked similarity to those in this case. That case also concerned an action by a purchaser of immoveable property for damages arising out of the delay caused by the defendant in giving possession of the premises sold, and it followed an earlier action by the purchaser for specific performance. The latter action did not go to trial as the defendants gave possession, though some two months after the date stipulated for performance. No question was raised in the second action as to whether the plaintiff's claim for damages could lie having regard to the fact that the sale had been completed. It is true that the damages claimed did not refer to loss of rent, but that was because no rent had in fact been lost by the plaintiff, and general damages were given for the breach. My attention was, however, invited by counsel for the defendants to a passage in Atkin's Court Forms (2nd Edn.) Vol. 34 at p. 295, where it is stated:

- “If one party commits a breach of contract the other party may be able to affirm the contract and claim damages for the breach. It should be observed however, that a party will not usually be able to recover damages for a breach of contract for the sale of land after the contract has been completed.”

A footnote to this passage carries the further statement that:

“The purchaser may be able to sue on covenants for title, or on other express provisions, or on warranty, or for fraudulent misrepresentation.”

It is to be noted that the learned author states that a party “will not usually be able to recover damages” and I do not think the instances given in the note where damages can exceptionally be claimed are exhaustive. I think this view is borne out by the statement in Halsbury’s Laws (3rd Edn.) Vol. 34 at p. 378 to the following effect:

“After completion of the contract the transaction is as a general rule at an end between vendor and purchaser, and no action can be maintained by either party against the other for damages or compensation on account of errors as to the quantity or quality of the thing sold, except in so far as the purchaser may be entitled to sue on the covenants for title or on any express provision for compensation for errors of description or in respect of any breach of a warranty or collateral agreement or for fraudulent misrepresentation. The purchaser cannot on the ground of adverse claims recover purchase-money which has been paid or detain money unpaid; but he must rely on the covenants for title. In the absence of covenant for title or so far as these do not apply, he is without remedy in relation to his purchase-money, unless he can obtain rescission on the ground of fraud or mistake.”

The type of action contemplated in that passage is one relating generally to title, and neither of the passages I have quoted are meant, in my opinion, to cover an action for damages for delay or for some other similar breach of contract. The case of *Joliffe v. Baker* (2), on which the defendants’ counsel relied for his contention, concerns an action for damages for misrepresentation as to the extent of the land sold. Similarly, the case of *Palmer v. Johnson* (3) concerns a mis-statement as to the actual rental of freehold property, and an action was filed and succeeded in claiming compensation for this mis-statement. Those cases relate to title and have no bearing on the question of a claim for damages for delay. In my opinion there is no impediment in the fact that the conveyance has been completed to an action by a purchaser for damages for delay, and I do not think, therefore, that the first objection taken by the defendants to the frame of the plaintiffs’ suit is sustainable.

It is then contended for the defendants that since Lord Cairns’ Act, a claim for damages must be combined with one for specific performance. That Act is, in my opinion, an enabling Act which does no more than allow parties to avert what was the necessary practice before of presenting a separate action for each relief in different courts. The Act does not oust an action for damages if not combined with one for specific performance. *Phillips v. Lamdin* (1) is a case where a suit for damages was filed separately from an earlier suit for specific performance, but it was sought for the defendant to distinguish that case as an authority for presenting a separate action by reason of the fact that the point was not taken as to whether a plaintiff could do so. I do not think that this is a valid distinction. It is a case as recent as 1949, and I have no doubt that such a point, if of substance, would certainly have been taken.

If I understand defence counsel clearly I think it was also argued that a claim for damages could not be entertained unless it fell within the two categories mentioned in *Chinnoch v. Ely* (4) namely, damages for loss of value of property or arising on the ground of arrangements entered into by the purchaser on the faith of the contract. But the learned Vice-Chancellor in that case indicated the necessity for the purchaser to prove some special injury, and it must not be thought that he was confining the type of injury only to the two categories he gave.

It is then contended for the defendants that no delay has been averred in the plaint, or proved, which could be the subject of compensation, and that even if the contrary be held, the plaintiff must establish that the delay on the part of the defendants was wilful. In my opinion, the plaint clearly alleges the circumstances of delay even though that word is itself not employed. A reference to the correspondence, which was exhibited by consent of the parties and is contained in the volume marked Ex. 2, establishes beyond any doubt that there was delay and that this delay arose as a consequence of the defendants' conduct. I do not think it necessary to deal with this correspondence in detail. Their content is not contested. It is established that the plaintiffs were always ready to complete the sale but that they were unable to do so until May 20, 1959, by reason of the defendants' refusal to do so.

I now turn to the contention for the defendants that it is not sufficient for the plaintiffs to prove a simple default in completion of the sale and that they must prove that the default was wilful. It is said that a bona fide contest as to the rights of a vendor, arising upon and in the circumstances under which an agreement of sale is entered, cannot amount to wilful default on his part in declining to complete the sale until the contest as to his rights has been resolved. In *Jacques v. Millar* (5) the defendant refused to give possession of premises under a written agreement of lease on the grounds that there was no finality about the agreement as to the time for letting. The plaintiff filed a suit for specific performance and damages. Despite the bona fide contest by the defendant as to the legal effect of the agreement, Fry, J., in ordering specific performance also awarded damages on the ground of the delay caused by the defendant's "wilful refusal" to perform his contract. It is noteworthy that in assessing damages the learned judge had regard to the period from the date of agreement to the date at which the plaintiff acquired other and alternative premises, and that no allowance was made for the period taken up by the litigation. In the present case the contest arose between the parties as a consequence of the refusal by the defendants to give vacant possession of that portion of the premises sold which they had relet after the agreement of sale, or to pay compensation by way of an abatement of the purchase price in lieu thereof. The defendants took up this attitude on January 24, 1953, and persisted in it before the Supreme Court, the Court of Appeal for Eastern Africa and the Privy Council, when finally they lost their contest. The case of *Jones v. Gardiner* (6) concerned a claim for damages for delay on the part of the vendor in completing the sale, and Byrne, J., said this ([1902] Ch. at p. 195):

"On the other hand, *Engell v. Fitch*, which was considered in *Bain v. Fothergill*, so far as it determines that where the breach of contract arises, not from inability to make a good title, but from refusal to take necessary steps to give the purchaser possession pursuant to the contract, further damages may be recovered, appears to remain good law."

No consideration was given in that case to the question whether the refusal was simple or wilful, and indeed the facts of the case disclosed that the delay was caused more by the vendor not having used reasonable diligence to perform his contract. In *Phillips v. Lamdin* (1) the delay of the vendor in completing the sale was held ([1949] 2 K.B. at p. 39) to be due to his wilful default "in the absence of any indication at all of their being some question of deficiency in title or any one of the ordinary causes for delay which excuse people for not carrying out on the day fixed for completion, the completion of a sale of property of this sort . . ."

Bennett v. Stone (7) was also relied upon for the defendants. That case concerned a suit for specific performance of a contract for the sale of land and a claim for damages, the latter being based upon a provision in the contract that "if

from any cause whatever other than wilful default on the part of the vendors the completion of the purchase is delayed” beyond the date named, the purchase money should bear interest at 5 per cent. It was held that there had been no wilful default and that accordingly interest was not payable. Nevertheless, the plaintiff was held to be entitled to an account of the rents and profits received by the defendants from the date named in the agreement for completion of the sale. I will refer to this award again later in this judgment. In that case, reference was made to the definition of wilful default given by Bowen, L.J., in the case *Re Young and Harston’s contract* (8) in these terms ((1886) 31 Ch.D. at p. 174):

“What does wilful default mean in a contract like this? The term ‘wilful default’ – though one in common use in such contracts – is not a term of art, and to pursue authorities with a view to defining for all time what is its meaning in a contract like this appears to me to press citation far beyond the point at which it ceases to be useful. Default is a purely relative term, just like negligence. It means nothing more, nothing less, than not doing what is reasonable under the circumstances – not doing something which you ought to do, having regard to the relations which you occupy towards the other persons interested in the transaction. The other word which is sought to define is ‘wilful’. That is a word of familiar use in every branch of law, and although in some branches of the law it may have a special meaning, it generally, as used in courts of law, implies nothing blameable, but merely that the person of whose action or default the expression is used, is a free agent, and that what has been done arises from the spontaneous action of his will. It amounts to nothing more than this that he knows what he is doing, and intends to what he is doing, and is a free agent.”

The decision in *Bennet v. Stone* (7) went before the Court of Appeal and the learned Lord Justices were at pains to consider the implications of the words “wilful default”. Vaughan Williams, L.J., said ([1903] 1 Ch. at p. 515):

“And I think the case also leaves untouched these words of Lindley, L.J., in *Re Hetling and Merton’s Contract* ((1893) 3 Ch. 269 at p. 281): ‘Whatever may be the popular meaning of wilful default, whatever the expression may mean in dealing with other matters, it is now settled that moral delinquency, intentional delay, wilful obstruction, on the part of a vendor, may all be absent, and yet there may be wilful default on his part disentitling him to interest under a contract such as that before us’.”

At p. 516 he said:

“Honesty of intention, therefore, will clearly not prevent the act of the vendor from being ‘wilful’ but mere failure to perform will not constitute ‘default’; to constitute default there must be neglect of duty, neglect to do something which the vendor ought to have done, having regard to his duty to the purchaser.”

In considering whether there was wilful default by the vendor in completing the sale in that case, the court was concerned only with the question whether the vendor was justified in objecting to the form of conveyance submitted by the purchaser, a very different matter from the contest between the parties in the case before me. Furthermore, there was an express stipulation in the contract between those parties that the purchaser would pay interest on the purchase money if the completion of the purchase was delayed, other than through the wilful default of the vendor. There is no such provision in the contract between the present parties, and I am concerned only with whether the delay in completing the purchase was caused through an act of default by the defendants which entitled the plaintiffs to compensation. I do not think that any of the cases cited for the defendants are authority for the proposition that, provided a legal

contest as to the rights of the parties is genuine and bona fide, even though mistaken, a purchaser may not be compensated for being deprived of the profits of his purchase which he would have received had the sale been completed on the date for completion and which the vendor has received. I think this is clearly borne out by the opinion of Parker, J., in the case of *Re Bayley-Worthington and Cohen's Contract* (9). That case also concerns an agreement for sale of land which contains a clause providing for payment of interest at a higher rate if the completion of the purchase was delayed by the neglect or default of the purchaser. The purchaser resisted completion on grounds of an objection going to the root of the vendor's title. The learned judge said ([1909] 1 Ch. at p. 663).

"In the present case, having regard to the fact that the purchase-money was very large in amount, that the land was required for building purposes that the purchaser's objection went to the root of the title and raised a difficult point of law, I am not prepared to say that he acted otherwise than honestly and reasonably for his own protection in refusing to complete before the question at issue had been set at rest by the decision of the House of Lords. If, therefore, I were to apply the principle which appears to be laid down in the passages to which I have referred in Stirling, L.J.'s judgment, I should have to hold that the purchaser had not been guilty of a default. I do not, however, think that I ought to apply these principles, first, because I am of the opinion that a purchaser refusing to complete on the ground that the title is bad, though it is in fact a perfectly good title, is, however wisely he may be acting in his own interest, guilty of default, because he is committing a breach of his duty to the vendor, and, secondly, because I think this view is not only consistent with but is borne out by all that is said in the reported cases with the exception of the passages to which I have referred in Stirling, L.J.'s judgment; and it is very possible I am not interpreting these passages correctly, for the Lord Justice evidently is not intending to depart from any earlier case. I hold, therefore, that in the present case the purchaser was guilty of default within the meaning of the contract."

It is noteworthy that in that case the court was concerned with interpreting the implication of the mere word "default". In the present case there was no contest as to title or form of conveyance, which had been accepted in January, 1953. In failing to complete the sale the defendants were, in my opinion, and on the authorities which I have considered, clearly in default entitling the plaintiffs to compensation.

On the question of the measure of damages, it is contended for the defendants that the loss of the rent as the measure could not have been in the contemplation of the parties at the time of the agreement. The principle upon which the measure of damages for breach of contract is based is stated in *Hadley v. Baxendale* (10) as being:

"such as may fairly and reasonably be considered either arising naturally from such breach itself or such as may reasonably be supposed to have been in the contemplation of both parties at the time they made the contract, as the probable result of the breach."

It is contended for the defendants that as there is express provision in cl. 10 of the agreement between these parties allowing the plaintiffs one-fifth (and by analogy the defendant four-fifths) of the rent from the date of the agreement to the date of the execution of the conveyance, the plaintiffs cannot claim the four-fifths as their damages before the date of completion. But the agreement provides under cl. 6 that the sale was to be completed by a proper conveyance

by March 31, 1952, and as the plaintiffs had purchased the property, which consists of three shops, with the clear purpose of acquiring the profit rents therefrom, it must have been in the implied contemplation of both parties that any unreasonable delay by the defendants in completion of the sale would result in the loss of those rents to the plaintiffs and that they must form the measure of the damage which the plaintiffs would suffer by reason of such loss. Apart from this, however, it is a clear inference from the circumstances of the case that the loss of rent represents the damages which may fairly and reasonably be said to arise naturally from such breach. There is the further well-known general rule of common law where a party has sustained a loss by reason of a breach of contract he is, so far as money can do it, to be placed by way of damages in the same position as if the contract had been performed – *Diamond v. Campbell-Jones* (11), *Engell v. Fitch* (12). The facts in *Diamond v. Campbell-Jones* (11) are however, quite distinguishable from those in the present case. In that case it was held that knowledge of the particular purpose for which the purchaser wanted the property could not be imputed to the vendor; in the present case the circumstances warrant that clear inference. In my opinion the measure of the plaintiff's damages is undeniably the four-fifths rent which he lost by reason of the defendants' delay in completing the sale. The date set by the agreement for completion was March 31, 1952. Making allowance for reasonable delay the latest date by which the sale should have been completed was January 24, 1953. The conveyance was in fact completed on May 20, 1959. The plaintiff is in my opinion entitled to damages based on the loss of four-fifths of the rent for the period January 24, 1953 to May 20, 1959, subject, of course, to certain deductions with which I will deal now.

As to the deductions to which the defendants are entitled it is urged for them that they should be allowed:

- (a) interest on the balance of the purchase price of Shs. 100,000/- from March 31, 1952 to May 20, 1959;
- (b) the rent received by them for the one shop in respect of which the purchase price was abated by Shs. 18,000/-;
- (c) a deduction in respect of rent accruing after the order for specific performance dated October 15, 1956?
- (d) the amount of income tax paid by them on the net rents received by them, or the amount of income tax which the plaintiffs would have paid had they received the rent, whichever is the higher;
- (e) all outgoings such as rates.

I will deal with each of these in turn. In regard to interest, to allow the defendants to receive interest on the balance of the purchase price would amount in effect to allow them to take advantage of their own default. The balance of the purchase price was payable only against conveyance and hence the defendants were not entitled to such until May 20, 1959, when they ultimately completed the conveyance. Completion was in no way delayed by the plaintiffs, at all events after January 24, 1953. That was the date on which the defendants' advocates wrote clearly defining their attitude and their refusal to complete the sale in accordance with the terms of the contract. It is from that date that I think the plaintiffs' damages should run and I have no doubt that there should be no allowance for interest on the unpaid balance of the purchase price.

In regard to (b) above, it is argued that as the plaintiffs recovered a diminution of the purchase price of Shs. 18,000/- in respect of the one shop which had been let after the sale, there should be no award of rent as damages in respect of that shop. I understood the submission to be that this sum represents the value of the shop and that, therefore, as the plaintiffs have had the benefit of

the payment of that value they should not be allowed to recover rent. But the sum of £900 did not represent the value of that shop. It represented its diminished value by reason of the reletting. The defendants have continued to receive rent for that shop, an income which would and should have been the plaintiffs from March 31, 1952. No deduction is warranted under this head.

It is then contended that all rent subsequent to October 15, 1956, the date of the order of the Court of Appeal for Eastern Africa for specific performance, should not be awarded to the plaintiffs on the grounds that had the latter taken steps to enforce the order they could have obtained possession of the premises and received the rents. This must be a fallacious argument. The fact remains that even if the plaintiffs are at fault in not enforcing the order, the defendants nevertheless remained in possession and received rent to which they were not entitled. Apart from this, however, the order of the Court of Appeal was under appeal to the Privy Council and I think it is unlikely that the Court of Appeal would have made any order that might have had the effect of forestalling the decision of the Privy Council.

I come now to the suggested deduction for income tax. In this regard I would say that, if the defendants will suffer a loss by reason of having paid income tax on the rent income which they now have to pay to the plaintiffs, that is due solely to their own act in refusing to pay the income of the plaintiffs. Apart from this, however, the plaintiffs will under the provisions of s. 8 (2) of the local Income Tax Act, 1952, in respect of the period when that Act was in force, and under s. 4 (d) of the Act of 1958, for the subsequent period, have to pay income tax on the sum they recover from the defendants, and I can see no reason why they should bear the additional burden of the tax paid by the defendants through their own default.

Finally, there is the question of a deduction for outgoings. Such a deduction is proper and is not contested by the plaintiffs and there should of course be an allowance for such rates and taxes and necessary repairs that the defendants have had to pay or incur in respect of the property.

The plaintiffs must succeed in this action and they are entitled to a declaration for damages for breach of contract. I think they are equally entitled to compensation by the defendants on the grounds of money had and received by the latter. I have, however, not written a considered judgment in this regard in view of my decision as to the defendants' liability in damages. There will therefore be the following orders, namely:

- (1) An order declaring the plaintiffs are entitled to damages and to be paid such damages, to be calculated at the rate of four-fifths of the rent received by the defendants for the period January 24, 1953 to May 20, 1959 less deductions for all proper outgoings such as rates, taxes and necessary repair expenses, but not including income tax.
- (2) An order that the defendants will pay to the plaintiffs interest on the net amounts of rent, after deductions of such outgoings aforesaid, calculated at 8 per cent. per annum from January 24, 1953, to the date of filing of this suit, and thereafter at 6 per cent. per annum, upon the net sums of rent as received each month.
- (3) An order that an account be taken by the Registrar of the rent and interest due to the plaintiffs, such account to be taken and completed within six weeks of to-day.
- (4) An order that the plaintiffs will be paid by the defendants the general costs of the suit, with a certificate for two counsel, such general costs to include all costs to date, except

- (a) those costs incurred and relating to the argument on estoppel of April 26, 1963, which shall be the costs relating to and incurred by one day's hearing and the delivery of the court's ruling, such costs to be the defendants'; and
- (b) the costs incurred in relation to the plaintiffs' application for amendment of his plaint on July 4, 1963, which shall be the costs relating to and incurred by one day's hearing, the delivery of the ruling and the filing/service of the amended plaint, such costs to be the defendants'. The plaintiffs shall be allowed to set off these costs against the general costs awarded to them in respect of the action.

Judgment for the plaintiff accordingly.

For the plaintiffs:

Hamilton, Harrison & Mathews, Nairobi

Gerald Harris and J. D. M. Silvester

For the defendants:

D. N. & R. N. Khanna, Nairobi

D. N. Khanna

Mohamed Amin Nizam Din v Mohamed Sharif
[1964] 1 EA 752 (HCU)

Division:	High Court of Uganda at Kampala
Date of judgment:	10 June 1964
Case Number:	257/1960
Before:	Sheridan J
Sourced by:	LawAfrica

[1] Landlord and tenant – Mailo land – Lease of portion of land by African landlord to Asian lessees – Governor's consent to lease necessary – Consent not obtained – Subsequent sub-lease of portion of land to Asian sub-lessee – Formal head lease later signed and registered between African landlord and succeeding lessee – Action by succeeding lessee against sub-lessee for possession – Whether sub-lease unenforceable for want of consent thereto and to first head lease.

Editor's Summary

The plaintiff claimed an order for possession of land occupied by the defendant, the demolition of the defendant's buildings erected thereon and damages for adverse possession. Both parties were Asians and the subject matter was mailo land. The landlord, Wamala, an African, had in or about 1934 leased a portion of the land jointly to M.A. and N.D.A. the latter being the plaintiff's father. The lease was lost

and was treated as conferring a yearly tenancy; it had not been registered nor had the necessary consents from the Governor been obtained. On September 17, 1934 the two lessees sublet by an unregistered document a portion of this land to the defendant for a period of 49 years and by arrangement the defendant was to pay rent direct to Wamala. Subsequently, both the plaintiff's father and the defendant erected temporary buildings on their respective plots. On December 25, 1953 the plaintiff's father died and the plaintiff took over the reversion of the sub-lease. In 1954 the government announced that proper leasehold titles on mailo land could be granted to non-Africans provided that the necessary consents were obtained. It was agreed between the parties that the plaintiff would apply for the lease on the basis that both the plaintiff and defendant would share the expenses. This the defendant failed to do. On January 1, 1955 Wamala granted the plaintiff a lease, which was registered in 1957, for 49 years of the whole plot and by c. 2 the plaintiff agreed that the buildings then on the plot would be demolished and new buildings erected within five years. Thereafter, Wamala refused to accept rent from the defendant and the plaintiff filed this suit. Prior to 1954 legislation prohibited the transfer of mailo land to non-Africans without the consent in writing of the Governor. The

substantial questions for consideration at the hearing were whether the sub-lease of September 17, 1934 was enforceable against the sub-lessor and whether there was fraud within s. 145 of the Registration of Titles Ordinance sufficient to vitiate the title obtained by the plaintiff under the registered head lease. It was argued on behalf of the defendant that earlier enactments referred only to acts of the mailo owner and could not affect the agreement between the lessee and sub-lessee.

Held –

- (i) the earlier enactments, despite the different wordings, did cover transfers of mailo land where both the transferor and transferee were non-Africans; therefore, in the absence of the consent in writing of the Governor the 1934 agreement was unenforceable;
- (ii) in any event the original agreement between the landlord and the plaintiff's father could not escape the earlier enactments.

Judgment for the plaintiff. Order for possession and demolition of the buildings and damages.

Cases referred to in judgment:

- (1) *Motibhai Manji v. Khursid Begum* (1957), E.A.101 (U).
- (2) *Souza Figuerido & Co. Ltd. v. Moorings Hotel Co. Ltd.* (1960), E.A.926 (C.A.).
- (3) *Kulubya v. Amar Singh* (1961), E.A. 157 (C.A.): (1963), E.A. 408 (P.C.).

Judgment

Sheridan J: The plaintiff claims (1) an order for possession of land occupied by the defendant and the demolition of the defendant's buildings erected thereon, and (2) damages for adverse possession.

The plaintiff and the defendant are Asians. The subject matter of the suit is mailo land comprised in Mailo Register Vol. 320, Folio, 9 and situate at Nakivubo, Kampala. Matiya Kafero Wamala (P.W.2) is the African landlord.

In or about 1934 Wamala leased a portion of the land jointly to Murid Ahmed and Nizam Din Ahmed, the plaintiff's father. The lease has been lost and all that Wamala can say about it is that there was a written agreement which was not registered as the necessary consents had not been obtained and that it was for a yearly tenancy.

On September 17, 1934, the two lessees sublet a portion of this land to the defendant for a period of 49 years. There was to be a progressive rent ranging from Shs. 30/- per annum in 1934 to Shs. 120/- per annum by 1949. By arrangement the defendant paid his rent direct to Wamala. The agreement (Ex. D) provided that it should be binding by the parties, their heirs and successors. Both the plaintiff's father and the defendant erected temporary buildings on their respective plots. Murid Ahmed has been lost sight of and he drops out of the picture.

On December 25, 1953, the plaintiff's father died and the plaintiff stepped into his shoes. In 1954 Government announced that proper leasehold titles on mailo land could be granted to non-Africans provided the necessary consents were obtained. Wamala approached the plaintiff for this to be done. I accept the plaintiff's evidence about this and that he and the defendant agreed that he would apply for the

lease and that they would share the expenses leaving the defendant to continue to occupy his portion of the plot. According to the plaintiff the expenses included the payment of a premium of Shs. 8,000/- to Wamala. Wamala admitted that there was a premium but was, perhaps understandably, coy about admitting the amount.

On January 1, 1955, Wamala granted the plaintiff a lease for 49 years over

the whole plot at a yearly rental for Shs. 400/-. By cl. 2 the plaintiff agreed that the buildings then on the plot would be demolished and new buildings would be erected within five years. In 1957 this lease was registered in the Leashold Register under the Registration of Titles Ordinance, and a certificate of Title was issued (Ex. B. with lease). The delay in registration was due to mortgages on the land. This lease is the basis of the present suit.

When it originally came on for hearing on November 14, 1960, before Lewis, J. he framed the following issues:

- (1) Is the lease of September 17, 1934 enforceable;
- (2) Was there a fraudulent agreement between the plaintiff and Wamala?

From the Bar I was informed that I could adopt them. I will deal with issue (2) first.

From the evidence I am satisfied that Wamala accepted rent from the defendant as the plaintiff's father told him that the defendant was staying on the plot and that he knew nothing of the 1934 agreement (Ex. D.) He was within his rights in refusing to accept rent from the defendant after 1955 when the registered lease with the plaintiff was in force. The most that can be said against him is that, to oblige the plaintiff, he brought an abortive suit to dispossess the defendant. The plaintiff for his part was obliged to demolish the old buildings and erect new buildings on the land. The defendant had failed to pay his part of the expenses and so he went ahead and had plans prepared (Ex. C) covering the whole plot. These have provided for three semi-detached buildings. Two have been erected and the third awaits the demolition of the defendant's temporary building.

Section 145 of the Registration of Titles Ordinance [U.] provides that nothing short of fraud shall be relevant to the circumstances in which a title came to be registered. Otherwise the title cannot be impeached. I am unable to find that the plaintiff and Wamala fraudulently conspired to execute the lease in order to oust the defendant from his occupation of his portion of the land.

It is submitted that the answer to the first issue depends on consideration of (1) the Land Transfer Ordinance, 1944, and (2) the Buganda Land (Amendment) Law, 1942.

By s. 3 of the Land Transfer Ordinance 1944:

"No non-native shall without the consent in writing of the Governor occupy or enter into possession of any land of which a native is registered as proprietor."

By s. 2 (d) of the Buganda Land (Amendment) Law, 1942,

"the owner of a 'mailo' shall not permit one who is not of the Protectorate to lease, occupy or use his mailo except with the approval of His Excellency the Governor and the Lukiko."

Counsel for the defendant submits, and I agree with him, that these provisions do not have any retrospective effect on the 1934 agreement, but it is necessary to delve further into the past.

The Land Transfer Ordinance, 1906, was the precursor of the 1944 Ordinance, and by s. 2 it enacted:

"No land in the occupation of, or held by, any native of the Protectorate, or any right title or interest in or over any immovable property so occupied or held, shall be transferred, either inter vivos or by will, either in perpetuity or for a term of years, to any person not a native of the Protectorate without the consent in writing of the Governor."

Likewise the Native Land Law, 1908, preceded the 1942 Buganda Land Law, and by s. 2 (c) and (d) it enacted:

- “(c) The owner of a mailo will not be permitted to hand over his mailo to one who is not of the Protectorate or to a church or to a religious or other society, except with the approval in writing of his Excellency the Governor and the Lukiko.
- (d) The owner of a mailo will not be permitted to lease his mailo to one who is not of the Protectorate for a longer period than one European year, except with the approval in writing of His Excellency the Governor and the Lukiko.”

Defendant’s counsel submits that these earlier enactments refer to the acts of the mailo owner and cannot affect the agreement (Ex. D) between the lessee and sublessee. Despite the different wordings my view is that the earlier enactments do cover transfers of mailo land where both the transferor and transferee are non-Africans, and that in the absence of the consent in writing of the Governor the 1934 agreement was unenforceable: *Motibhai Manji v. Khursid Begum* (1).

Even if I were wrong about this I do not see how the original agreement between Wamala and the plaintiff’s father could escape the earlier enactments which were then in force. Even if it were a yearly tenancy under s. 2 (d) of the 1908 Law and so did not require the consents then how could a 49 years’ sublease be carved out of it?

My answer to issue (1) is ‘No’.

The question of damages is not easy. The plaintiff, which was filed on March 29, 1960, claims three years’ rental of buildings let as Shs. 400/- per month – Shs. 14,440/-. Presumably the period was meant to run from the date of registration in 1957. The plaintiff gave evidence that the rent for the two completed buildings is Shs. 500/- per month from 1960. Counsel for the plaintiff, asks for damages at the rate of Shs. 250/- per month from 1960 until possession is given. A difficulty here is that the hearing was twice adjourned, partly at the suggestion of the court to await the final decisions in the *Souza Figuerido & Co. Ltd. v. Moorings Hotel Co. Ltd.* (2) and then the *Kulubya v. Amar Singh* (3). Otherwise it could have been disposed of before the end of 1960. This was not the defendant’s fault. Meanwhile his plot has been worth Shs. 150/- to him, and I think that is the correct rate of damages.

Accordingly I make an order for possession of the land now occupied by the defendant and the demolition of the buildings erected by him thereon, with damages at Shs. 150/- per month from March 29, 1960, until delivery up of possession, with costs.

Judgment for the plaintiff. Order for possession and demolition of the buildings and damages.

For the plaintiff:

Hunter & Greig Kampala

A. I. James

For the defendant:

Parekhji & Co., Kampala

Y. V. Phadke

Maria Eponia Gomes v Mehr Singh and Kehr Singh

[1964] 1 EA 756 (CAN)

Division: Court of Appeal At Nairobi
Date of judgment: 7 December 1964
Case Number: 40/1963
Before: Sir Daniel Crawshaw Ag VP, Duffus and Spry JJA
Sourced by: LawAfrica
Appeal from The Supreme Court of Kenya – Edmonds, J.

[1] Building contract – Architect not appointed – Construction supervised by unqualified owner – Architect subsequently engaged to report on defects and later to supervise work – Status of architect – Certificates issued by architect – Whether owner bound by certificates – Whether owner estopped from – alleging defects later.

Editor's Summary

By a building contract dated March 31, 1957, the respondents undertook to erect for the appellant a house at the price of Shs. 60,000/-. Payment was to be made by instalments according to the progress of the work, the house was to be completed by September 30, 1957 and Shs. 3,000/- of the price was to be retained for the usual maintenance period of six months. On or about September 18, 1957, the appellant, being dissatisfied with the work, engaged an architect, one, Newman, to inspect the building and report to her. Until then the building operations had been supervised by the appellant. Newman submitted a report dated September 19, 1957 showing a first schedule of defects. By this time the appellant had paid about half the contract price but refused to pay the next instalment of Shs. 5,000/-, which the respondents demanded, until the defects had been made good. The appellant then appointed Newman to act for her on a more general basis and following a meeting of all parties on the building site on September 26 and 27, 1957, Newman sent the respondents a further schedule of work required to be done. Some further work was done pursuant thereto, and on December 5, 1957, against what was described as a “final statement of account” issued by Newman, a payment was made of the balance of the contract price less Shs. 4,000/- which was retained as agreed enhanced retention monies. On April 26, 1958, just before the expiration of the maintenance period, Newman, after inspection of the building, sent the appellants another schedule of defects, maintenance items and insufficiencies, and on June 20, 1958, he issued a further certificate that Shs. 2,000/- of the retention money was payable to the respondents, leaving a balance of Shs. 1,034/50 to cover certain work still undone. The appellant refused to pay whereupon the respondents filed proceedings founding their claim on the certificate issued and not on the contract itself. The appellant counterclaimed damages for breach of contract alleging that the work done was not in accordance with the contract. In their reply the respondents alleged that an agreement had been reached between the parties on September 26 and 27, 1957, by which the appellant had agreed to accept performance of the work set out in the first schedule in satisfaction of the contract and had waived any other requirements of the contract. The substantial issues at the trial were (a) to what extent Newman was the agent of the appellant and to what extent she was bound by his acts, decisions and/or omissions (b) whether an agreement as alleged by the respondents had been reached on September 26 and 27, 1957 and (c) whether the certificate of June 20, 1958 had the effect of excluding the respondents from adducing evidence of

non-completion of the contract on the subsequent agreement in September, 1957. The judge gave judgment for the respondents and held that the appellant had appointed or held out Newman as her agent with delegated power to approve the work and that she was bound by his acts and decisions; that an agreement had been reached

in September, 1957 as to the work to be done, the substance of which was to be found in the first schedule, and that the work was in fact done to Newman's satisfaction except as to certain matters. The appellant thereupon appealed and the substantial grounds argued in support were that (a) Newman was not to function independently of the appellant and that by saying that work was to be done to Newman's satisfaction, she was not renouncing her own ultimate right to be satisfied (b) from the terms of the contract the appointment of an architect was not contemplated and that in cases where the owner was an unskilled person, the courts should lean towards regarding the requirement of the owner's satisfaction merely as a "superadded protection" and (c) Newman had never been given the power to issue certificates entitling the respondents to payment.

Held –

- (i) Newman was simply the owner's representative or agent but without the special standing of an architect appointed as such under a building contract;
- (ii) nothing was said in the contract that any expression of satisfaction was to be final, or as to the manner in which disputes were to be settled;
- (iii) where an ordinary person employs a builder for a building contract without an architect to protect his interest, any provision therein intended to deprive the owner of his right to recover damages for breach of contract must be in the clearest terms;
- (iv) the judge did not appear to have applied his mind to the question whether Newman was entitled to issue certificates for payment; the evidence, in any event did not indicate an understanding between the parties that payment would be made on certificates issued by Newman;
- (v) so long as any part of the work remained to be done there could not be satisfaction within the meaning of the contract, and it was common ground that some work under the contract had never been performed;
- (vi) there was nothing in the evidence to suggest that the appellant had agreed to waive any right she may have had to damages for breach of contract and the judge was wrong in holding that once the work required by the first schedule had been done the appellant was "precluded from alleging defective work";
- (vii) the appellant's attempt to supervise the work of construction would not estop her from later alleging defects, especially since it was not suggested that she herself ever expressed approval of the work;
- (viii) the appellant had not held herself out as agreeing to be bound by any certificates issued by Newman; and since the plaint was based on a certificate so issued and not on the contract itself, the suit should have been dismissed.

Appeal allowed.

Cases referred to in judgment:

- (1) *Newton Abbott Development Co. Ltd. v. Stockman Brothers* (1931), 47 T.L.R. 616.
- (2) *Cooper v. The Burial Board of Uttoxeter and Others* (1865), 11 L.T. 565.

The following judgments were read.

Judgment

Spry JA: The appellant, to whom I shall refer in this judgment as “Mrs. Gomes”, entered into a contract on March 31, 1957, with the respondents, to who I shall refer as “the contractors”, under which the contractors were to erect a house at Nakuru at the price of Shs. 60,000/-. I shall refer later to the terms of the contract but it may be convenient to mention here that payment was to

be made by instalments as the work reached certain stages, that the house was to be completed by September 30, 1957; and that Shs. 3,000/-, of the contract price was to be retained for the usual maintenance period of six months.

On or about September 18, 1957, Mrs. Gomes, being dissatisfied with the work of the contractors, appointed an architect, a Mr. Newman, to inspect the building and report to her. Newman caused the building to be inspected by his assistant and made a report which is dated September 19, 1957. I shall refer to this as "the report".

It appears that at this time the house was substantially complete and Mrs. Gomes had paid the first five instalments of the contract price totalling Shs. 29,000/-, and possibly a further Shs. 500/- (the accounts are not clear regarding this). The contractors now demanded the next instalment of Shs. 5,000/-, but Mrs. Gomes refused to pay until the defects mentioned in the report had been made good. She then appointed Newman to act for her on a more general basis which it will be necessary to consider in detail later.

Newman arranged to visit the building with the contractors and Mrs. Gomes, with a view to settling what was to be done. This meeting took two days, September 26 and 27, 1957, and following it Newman sent the contractors a schedule of work required to be done. This schedule is undated but was sent with a covering letter dated October 1, 1957. I shall refer to it as "the first schedule".

Some further work was apparently done and on or about October 31, 1957, the building was inspected by the Municipal Building Superintendent and an occupation certificate was issued. On December 5, 1957, Newman issued what was described as a "final statement of account" and on the basis of this, payment was made of the balance of the contract price less Shs. 4,000/-, which was retained as agreed enhanced retention money.

On April 26, 1958, that is, just before the expiration of the maintenance period, Newman visited the house with the contractors and subsequently sent them another schedule of defects, maintenance items and insufficiencies with a covering letter dated May 12, 1958. I shall refer to this as "the second schedule".

On June 20, 1958, Newman issued a certificate that Shs. 2,000/-, of the retention money was payable to the contractors, leaving a balance after certain adjustments of Shs. 1,034/50 to cover certain work still undone. Mrs. Gomes refused to pay and the contractors thereupon instituted proceedings. Mrs. Gomes counterclaimed for damages for breach of contract alleging that the contractors had failed to carry out the work in accordance with the contract. In reply to this counterclaim the contractors alleged that an agreement had been reached between the parties on September 26 and 27, 1957, by which Mrs. Gomes had agreed to accept the performance of the work set out in the first schedule in satisfaction of the contract and had waived any other requirements of the contract.

The learned judge, after hearing the case for the contractors and an outline of the case for Mrs. Gomes, framed the following issues:

- "1. To what extent was Newman the agent of the defendant and to what extent was she bound by his acts, decisions and/or omissions?
2. Was an agreement reached between the parties on September 26 and 27, 1957, as to the work which the plaintiffs were required to do under the contract; If so, what were the terms of the agreement, and what was the effect thereof? Were the terms of the agreement carried out?
3. Has the certificate of June 20, 1958, given by Newman, the effect of excluding the Defendant from

adducing evidence as to the non-completion

of the contract on the subsequent agreement of September 26 and 27? If so, was the certificate issued by mistake?

4. If the defendant is entitled to lead evidence as to non-completion of the contract on the subsequent agreement, what defects or deficiencies has she established?
5. Is anything due to the plaintiffs by the defendant or vice versa?"

When he came to pass judgment, he found on the first issue that Mrs. Gomes had appointed or held out Newman as her agent with delegated power to approve the work of the contractors and she was bound by his acts and decisions. On the second issue, he held that an agreement had been reached on September 26 and 27 as to the work to be done; that the substance of this agreement is to be found in the first schedule and that the work was in fact done to Newman's satisfaction except as to certain matters which would be covered by the sum of Shs. 1,034/50 retained by Mrs. Gomes.

The learned judge did not find it necessary to make any findings regarding the third and fourth issues and on the fifth issue he found that the sum of Shs. 2,000/-, was due from Mrs. Gomes to the contractors.

Against this decision Mrs. Gomes now appeals. Her memorandum of appeal contains some twenty-one grounds. Counsel for the appellant in his address did not follow the order of the memorandum but I think it will be more convenient if I do so in this judgment. I may add that the arguments relating to the original claim and the counterclaim are so interwoven that it is impracticable to attempt to separate them.

The first two grounds of appeal are to the effect that the learned judge was not justified in finding that Mrs. Gomes gave authority to Newman to approve the work or that she held out that he had such authority. Appellant's counsel contended that Mrs. Gomes had appointed Newman to advise and assist her, and not to function independently of her. In saying, as she did, that work was to be done to the satisfaction of Newman, she was not renouncing her own ultimate right to be satisfied. Appellant's counsel supported his argument, first, by references to evidence showing that so long as she lived in Nakuru, Mrs. Gomes continued to inspect the work herself, and, secondly, by the fact that Newman himself spoke of making "recommendations".

Counsel for the appellant also submitted that the learned judge had misdirected himself in regarding Newman as both an ordinary agent and a quasi-arbitrator. I do not propose to deal with this submission at any length, as in my view it is misconceived. I can find nothing in the judgment to indicate that the learned judge regarded Newman as anything but the agent of Mrs. Gomes.

It will, I think, be convenient at this point to consider what Newman's position was since this question underlay much of the argument. In the first place, it is to my mind quite clear that Newman was the agent of Mrs. Gomes and nothing else. She appointed him without prior reference to the contractors and merely informed them that she had done so. She appointed him, not at the beginning of the undertaking to advise generally, but when the building was substantially complete, when the date for completion had almost arrived and when she was convinced in her own mind that the contractors had failed to work to specification. And he was not appointed under the terms of the contract, as an architect, since the contract did not provide for any such appointment.

Secondly, it is important to bear in mind that there were two separate appointments: Newman was first appointed on or about September 18, 1957, merely to report on the state of the building; after he had done so, he appears to have been appointed to act on a more general basis. This second appointment was

made verbally on or about September 24, 1957, and on October 5, 1957. Newman thought it desirable to seek confirmation in writing of his instructions. On October 18, 1957, Mrs. Gomes replied confirming that Newman was authorised to act as her representative, with power to instruct the contractors on the work needed to be done. The letter concluded:

“When you are satisfied that the work has been carried out according to the contract please notify me before you certify completion.”

So far as the contractors were concerned, they received a letter from Newman dated September 24, 1957, in which he informed them that he had been instructed to act on behalf of Mrs. Gomes, and a letter dated the following day from Mrs. Gomes’ advocates confirmed this, requiring them to rectify all defects which Newman might point out, within such time as he might specify, and observing that until all defects had been rectified to Newman’s satisfaction, they were not entitled to receive the next instalment of the contract price. They were not informed of the contents of Mrs. Gomes’ letter of October 18, 1957.

Subsequent letters from Newman to the contractors with copies to Mrs. Gomes show Newman increasingly taking the line that it was he who had to be satisfied, and these letters apparently provoked no comment from Mrs. Gomes.

The learned judge summed up the position when he said:

“The contract between the parties in this case cannot I think in strictness be said to have been waived or indeed varied by the appointment of Newman and by the intimation in the correspondence I have quoted, an intimation which went unchallenged by the defendant, that the plaintiffs were to complete construction to his satisfaction. The contract itself provides that the work was to be effected by the plaintiffs to the satisfaction of “the owner or his representative”, and the appointment of a representative amounts to no more than the giving effect to that provision.”

and later:

“As a consequence of the correspondence which passed between the parties and Newman and of the defendant’s conduct it must be held, in my view, that the defendant held out to the plaintiffs that Newman was her representative or agent, to function independently of her, and that they were to carry out work as directed by him and to his satisfaction.”

In my view, the evidence, although possibly open to a different construction, entitled the learned judge to arrive at that finding.

The third, tenth and fifteenth grounds of the appeal concerned the interpretation of the contract itself. The relevant parts of the contract read as follows:

“Agreement to Carry Out the Works

The contractor hereby agrees to provide labour and material and carry out the works in constructing one double storey building consisting of 2 flats and 1 boy’s W.C.s etc. on plot Nos. 126 . . . (I.R.NO. 8836/123) *Ebrahim & Rahemtulla Estates Nakuru* Nakuru all as more fully described as per approved Plans Nos. ME. 900 and attached specification including drainage system, electric fittings, plumber works painting and decorating works etc. etc. . .

Amount To Be Paid

In consideration of the due and proper completion of the works to the satisfaction of the owners or their representative, the owners agree to pay to the contractor the sum of Shs. *Sixty Thousand only* (60,000:00)

Completion

The contractors agree to complete the whole of the works aforementioned according to the accompanying plans and specifications to the entire satisfaction of the owner or his representative before September 30, 1957 . . .

Payment

The contractors shall be entitled to receive instalments at agreed stages as and when approved by the owners or their representative in respect of works completed as follows: . . .”

Counsel for the appellant submitted that on a true interpretation, the contract required the contractors both to fulfil the requirements of the specification and to satisfy Mrs. Gomes. He argued that it was clear from the terms of the contract that the appointment of an architect was not contemplated and he suggested that in such cases, when the owner is an unskilled person, the courts should lean towards regarding the requirement of the owner’s satisfaction merely as a “superadded protection”, (to use the words of Roche, J., in *Newton Abbot Development Co. Ltd. v. Stockman Brothers* (1). Counsel for the respondents did not deal with this submission at any length, but he contended that this was a case where all the contractors had to do was to obtain the satisfaction of Mrs. Gomes or her representative, the expression of that satisfaction precluding Mrs. Gomes from later alleging that the work was not in accordance with the contract. He also contested the proposition that the contract did not contemplate the appointment of an architect, arguing that the word “representative” is wide enough to include an architect and should not be given a restricted meaning.

To deal with this last point first, I think it is quite clear that the contract did not contemplate the appointment of an architect as such, otherwise it would have been very differently worded. There was, of course, nothing to prevent Mrs. Gomes appointing an architect as her representative, as she in fact did, but for the purpose of interpreting the contract I have no doubt that the word “representative” was used in the general sense to cover any agent and that Newman’s standing was simply that of Mrs. Gomes’ agent, not the special standing of an architect appointed as such under a building contract.

Although the question whether an expression of satisfaction precludes an action for damages for breach of contract has come before the courts on numerous occasions, neither counsel was able to cite any case, nor am I aware of any, where the facts were similar to those in the present case. All that does, I think, emerge clearly from the reported cases is that each case must be decided on the interpretation of the particular contract. I do not, therefore, propose to examine, in this judgment, the cases that were cited to us.

It may be noted in connection with the contract the subject of these proceedings, that the paragraph quoted above headed “*Agreement to carry out the works*” is an unqualified undertaking to carry out the work in accordance with certain plans and the specification attached to the contract. It is only in the later paragraphs “*Amount to be paid*”, “*Completion*” and “*Payment*” that there are references to the satisfaction or approval of the owner or her representative. There is no express provision that any expression of satisfaction is to be final and there is no provision as to the manner in which disputes are to be settled.

Any ordinary person who employs a builder without having an architect to protect his interest places himself very much in the hands of the builder and obviously relies to a considerable degree on the skill and honesty of the builder. Faults in construction, particularly, of course, defects in the qualities or proportions of material are not likely to be observed by anyone other than an

expert and may not become apparent for some considerable time. In such circumstances, I think any stipulation intended to deprive the owner of his right to recover damages when defects become apparent should be expressed in the clearest possible terms.

So far as the present contract is concerned, the references to the satisfaction of the owner or her representative in the paragraphs "*Amount to be paid*" and "*Payment*" are, in my opinion, essentially a superadded protection, allowing the owner to refuse payment if the work were patently defective but should not be read by implication into paragraph "*Agreement to carry out the works*", so as to prevent her from recovering damages for breach of contract.

The fourth and seventh grounds of appeal are that the contractors' claim was based on a certificate which created no debt in law, since a certificate normally only creates a debt where the original contract provides for the issues of certificates. The contract out of which these proceedings arose contains no such provision. Counsel for the appellant contended that Newman had never subsequently been given the power to issue certificates entitling the contractors to payment and he submitted that if this were alleged, it should be strictly proved and the burden of proof was on the contractors.

The learned judge considered at some length whether Newman was entitled to express satisfaction but he does not appear to have applied his mind to the question whether Newman was entitled to issue certificates for payment. This question appears to have been dismissed in the words "That is unimportant . . ." but, with respect, I cannot agree, since the suit is founded on such a certificate.

Counsel for the respondent submitted that the parties had clearly shown by their conduct following the appointment of Newman, that they intended to be bound by the certificates he issued. He relied in support of this proposition on various passages from the evidence of Mrs. Gomes, Kehr Singh (one of the contractors) and Newman himself in which references were made to the issue of certificates. In particular reference may be made to a statement by Kehr Singh that he received certificates from Newman "from time to time". Newman himself in his evidence said that he "assumed" the duty of certifying when the stages for payment under the contract had been reached. An examination of the documentary evidence creates a rather different impression. As I have said, Mrs. Gomes had paid the first five instalments before Newman was appointed. On October 1, 1957, Newman by letter "recommended" that a payment of Shs. 8,000/-, be made to the contractors. This was not in accordance with the contract but he considered it would be unreasonable not to make such a payment in view of the fact that two instalments, totalling Shs. 28,000/-, would have been due having regard to the stage the building had reached, had the work been satisfactory. On November 6, 1957, in a letter to Mrs. Gomes, Newman confirmed an earlier verbal statement "that it would be in order" to pay a further Shs. 17,000/-, retaining the sum of Shs. 6,000/-, instead of Shs. 3,000/-, retention money provided for in the contract. There is nothing whatever to suggest that a certificate within the ordinary meaning of the word was issued on either of these occasions. On December 5, 1957, Newman prepared what he described as a final statement of account and to this appended a certificate that Shs. 2,999/50 was payable. Finally on June 20, 1958, he issued a certificate in the ordinary form for Shs. 2,000/-, and it was this amount which Mrs. Gomes refused to pay.

It will be noted that Newman never certified that any payment was due in accordance with the conditions for payment set out in the contract and in this respect his evidence must be regarded as unreliable. He recommended such payments as he thought reasonable and his letters of October 1, 1957, and November 6, 1957, were clearly recommendations in substance as well as in expression. It cannot be said, therefore, that more than one (if that) out of the

three payments made after Newman's appointment was made on a "certificate" issued by him and this would not, in my opinion, indicate an understanding between the parties that payment would be made on certificates issued by Newman. I can only assume that when witnesses at the trial spoke of "certificate" or "certifying" they were using those words loosely and that no significance is to be attached to the use of those words.

The fifth, sixth and eleventh grounds of appeal are that the learned judge erred in failing to appreciate that Newman never in fact issued any certificate of satisfaction. If he issued interim or progress certificates, they were not binding on Mrs. Gomes as expressions of satisfaction. In particular, it is alleged that the learned judge erred when he said that

"Newman's certificate and the letters of June 20, 1958, do not amount to a final certificate of completion, but they have a degree of finality which, in my opinion, cannot be challenged by [Mrs. Gomes]."

Counsel for the respondents on the other hand, submitted that there was no provision in the contract for any certificate of satisfaction or otherwise as to the manner in which satisfaction was to be expressed, or indeed imposing any obligation to communicate satisfaction. He argued that Newman's satisfaction with the work, except in certain specific and relatively small matters, was implicit in all the letters he wrote, particularly the letter of June 20, 1958, in which he referred to "the little left to do" which he thought would be covered by the sum of Shs. 1,034/50.

It is, I think, unnecessary to consider the matter of communication, because counsel for the respondents' argument must, in my opinion, fail on its second proposition. It is true that several of Newman's letters appear to express a limited or qualified satisfaction but so far as I am aware, to be binding on an owner, satisfaction must be entire and unqualified. The contract speaks of "the due and proper completion of the works to the satisfaction of the owners or their representative" and of the completion of "the whole of the works . . . to the entire satisfaction of the owner or his representative". It seems to me that so long as any part of the work remained to be done (and the performance had not been waived), there cannot have been satisfaction within the meaning of the contract, and it is common ground that some work under the contract has never been performed.

Counsel for the respondents did also suggest that, regardless of the contract, partial expressions of satisfaction would give rise to estoppel, if they had resulted in the contractors acting to their detriment. I think that is undoubtedly correct, but Counsel for the respondents was not able to point out, nor can I find in the evidence, any single specific respect in which, as a result of anything said or done by Mrs. Gomes or Newman, the contractors in fact acted to their detriment.

The eighth, ninth and twelfth grounds of appeal relate to the agreement alleged, in the reply to the counterclaim, to have been reached on September 26 and 27, 1957. It is submitted that the learned judge erred in holding that such an agreement had been reached and in holding that Mrs. Gomes had rectified it.

The agreement is alleged to have been reached at a meeting on the site attended by the contractors, Mrs. Gomes (at least on the first day) and Newman. Only one of the contractors, Kehr Singh, gave evidence and he never said that any agreement was reached – indeed he never appears to have been asked. He merely said "There was discussion about the work . . . Newman informed me and defendant as to the work I was to do. We have done that work". Far from proving a new agreement, Kehr Singh's evidence as a whole appears to have asserted compliance with the specification of the contract, and the putting right of all defects pointed out by Newman. Mrs. Gomes in her evidence flatly denied

that any such agreement was reached. She said “No agreement was reached on the site. No talk of abandoning anything I was entitled to under the contract”. The only evidence of this alleged agreement came from Newman. He said:

“... Intention of meeting was to agree the defects and to instruct contractor to rectify them. Defects were all discussed at that meeting and agreed to in a modified sense I can’t remember points in detail but generally I explained to defendant that as the owner had been supervising construction herself many of these defects must have been noticeable for a long time and that things like plastering of walls, floor finishes etc., could not be replaced completely but that certain repairs could be carried out. From that a compromise schedule of defects was agreed at that meeting and I drew it up and issued it to the contractor.”

The learned judge noted the failure of Kehr Singh to testify to the alleged modification of the contract and the denial by Mrs. Gomes that there was any such agreement but he observed that the first schedule did not cover all the defects mentioned in the report. He instanced two matters, floors and masonry, as exemplifying the differences (with respect, they appear to be the only two substantial differences). The learned judge accepted Newman’s evidence that he understood that Mrs. Gomes

“... not only accepted the necessity of a compromise in view of the extent to which the construction of the building had proceeded, but also agreed to a modification of the original contract.”

He found that the differences between the first schedule and the report corroborated Newman’s evidence and he found as a fact

“... that at the meeting held on September 26 and 27, 1957, the parties agreed to the modification of the original contract specifications and that the extent of the modification is set out in the schedule to Newman’s letter of October 1, 1957.”

Counsel for the appellant attacked this finding on two main grounds. In the first place, he submitted that the learned judge was not entitled to find that an agreement had been reached, when, in spite of it having been pleaded, the contracting parties failed to testify to it. In the second place, he argued that the learned judge misdirected himself in finding evidence of the alleged agreement in the differences between the Report and the first schedule: what the learned judge failed to take into account is that the items of the report which are missing from the first schedule reappear in the second schedule. If Mrs. Gomes had agreed to abandon her rights in respect of those items, the contractors would certainly have objected to their restoration in the second schedule. His contention was that these were items which were deferred to the maintenance period and he was able to find some support for this contention in the evidence of Newman himself.

Appellant’s counsel also argued, if I understood him correctly, that even if agreement had been reached on a modified specification in view of the impossibility of remedying some of the fundamental defects, such as agreement would not in itself deprive Mrs. Gomes of her right to recover damages to the extent that a house built to such modified specification (due to the plaintiff’s default) would be of less value than the house contracted for.

Counsel for the respondents’ submission on this issue was that the alleged agreement of September 26 and 27, 1957, was an agreement as to what work would be accepted by Mrs. Gomes as in full satisfaction of her rights under the contract. He argued that even if Mrs. Gomes had not expressly agreed to the modification of the contract, her conduct subsequent to the receipt of the

first schedule amounted to ratification of an agreement reached between Newman, on her behalf, and the contractors.

It is, I think, quite clear that when the meeting of September 26 and 27, 1957, took place, the quality of the building fell considerably short of what was called for in the specification and I think it is clear that agreement was reached as to the immediate steps to be taken. But I can find nothing in the evidence even to suggest that Mrs. Gomes agreed to waive any right she may have had to damages for breach of contract. Even Newman's evidence goes no further than indicating that he thought Mrs. Gomes was estopped from asserting defects which should have been apparent during the period when she or her husband was supervising the work and that he expressed this opinion to Mrs. Gomes. I think all the evidence is consistent with the discussions of September 26 and 27, 1957, having resulted in no more than an acceptance of Newman's advice as to what defects could then be put right taking into consideration the advanced stage of the building; the learned judge himself observed more than once that at that stage it would not be practicable for some of the contractual specifications to be properly carried out. In my view, therefore, the learned judge was wrong in holding that once the work required by the first schedule had been done (if it was done), Mrs. Gomes was "precluded from alleging defective work".

The learned judge added a general comment at the end of his judgment, that it was clear that Mrs. Gomes had not got the building for which she contracted. He added:

"This is due to the fact that she chose during the first six months of the construction work to be her own supervisor, a task for which she was, understandably, quite unfitted, to the fact that when she finally called in an unqualified person to advise her on the work the building had reached such a stage that it was feasible to remedy some of the defects, and to the fact that she thereupon was obliged to accept a very much modified construction."

With respect, I think this is a serious misdirection. The fact that Mrs. Gomes may have attempted to supervise the work of construction would not in, my opinion, estop her from later alleging defects, especially as it was not suggested that she herself ever expressed approval of the work (*Cooper v. The Burial Board of Uttoxeter and Others* (2)).

I have not dealt specifically with all the grounds of appeal or all counsel for the appellant's submissions but I think I have dealt with enough to cover the substantial issues.

In my view, it was not established that Newman had any right under the contract or any subsequent agreement to issue certificates entitling the contractors to payment; nor that Mrs. Gomes had held herself out as agreeing to be bound by any certificates issued by him; and since the plaintiff was based on a certificate so issued and not on the contract itself, I consider that the suit should have been dismissed.

As regards the counterclaim, I do not consider that the evidence proved that Mrs. Gomes ever agreed to waive any rights she may have had to damages for breach of contract; I do not consider that the evidence shows that either Mrs. Gomes or Newman on her behalf ever expressed final satisfaction with the work nor do I think that under the terms of the contract an expression of satisfaction would have precluded an action for damages. The learned judge found as a fact that the building did not comply with the specification and against that finding there has been no cross-appeal. I think that the counterclaim ought to have been allowed.

Counsel for the appellant asked this court, if it allowed the appeal, itself to assess the damages on the counterclaim and although the material before us is scanty, I do not think any useful purpose would be served by remitting the proceedings to the Supreme Court.

In her counterclaim, Mrs. Gomes asked for specific damages for defects set out in a schedule annexed thereto and also general damages for delay in the completion of the work. The latter claim was not pursued at the hearing, and counsel for the appellant asked us to assess damages on the basis of reinstatement so far as such damages were proved. The schedule annexed to the counterclaim listed some eighteen defects, with the estimated cost of putting each right in accordance with the contract. Unfortunately, when the suit was heard, it was not possible to call as a witness the quantity surveyor who had prepared the schedule. Evidence as to defects was given by three expert witnesses, Mr. Vail, a chemist, Mrs. Sutcliffe, a structural engineer, and Mr. Lustman, an architect. The evidence of these witnesses, whose evidence was not considered by the learned judge, but which was not seriously challenged, leaves no doubt that the construction of the house was far from satisfactory but it is only the evidence of Mr. Lustman that is of any assistance in quantifying the damages, and he did not deal with all the items in the schedule to the counterclaim and his assessments of the probable cost of rectifying the various defects differ, as is only to be expected, from those of the author of the schedule. In these circumstances, it would seem that damages cannot be awarded for any items not included in the schedule or in excess of the amounts claimed in the schedule, and those items and those amounts can only be allowed so far as there is evidence to support them. Furthermore, since Mrs. Gomes is claiming the amount needed to rectify the defects, she must bring into account the unpaid balance due on the contract.

On this basis, Mrs. Gomes would appear entitled to recover Shs. 700/- in respect of window sills; Shs. 150/-, in respect of the stairs; Shs. 300/-, in respect of plaster below the plinth; Shs. 900/-, in respect of doors and frames; Shs. 2,900/-, in respect of the floors; Shs. 2,200/-, in respect of the roof; Shs. 80/- in respect of the picture rails; Shs. 100/-, in respect of shelves not fitted; Shs. 400/-, in respect of the dampcourse; Shs. 40/-, in respect of chimney caps and Shs. 80/-, in respect of door bolts, a total of Shs. 7,850/-, less Shs. 3,034/50 unpaid on the contract, a difference of Shs. 4,815/50. This may well not represent the full loss which Mrs. Gomes has suffered but it is all, I think, than can properly be awarded on the evidence.

Accordingly I would allow this appeal with costs and set aside the judgment and decree of the court below. I would order that the respondents' suit be dismissed with costs, and that damages in a sum of Shs. 4,815/50 be awarded to the appellant on her counterclaim with costs. I would certify for two counsel here and the court below.

Duffus JA: I agree with the judgment of Spry, J.A. The evidence shows that Newman was appointed by the appellant, Mrs. Gomes, as her agent to see that the respondents constructed her house in accordance with the contract. There were some variations with regard to the work to be done and when payments were to be effected, but it is clear both in the original contract and in the subsequent arrangements made by Newman and the respondent that final payment was only to be effected when the work had been satisfactorily completed. In this respect I would refer to the eighth paragraph under the sub-head "Payment" in the original contract (Exhibit A) and further to the memo dated June 16, 1958 (p. 36 of the record of appeal), signed by the first respondent on behalf of his firm stating:

“Balance due upon satisfactory completion of the maintenance repairs – Shs. 3,034/50.”

The evidence does not support the plaintiff/respondents’ case that the amounts became payable on Newman’s certificate as an architect. It is admitted that the work was never, in fact, completed and therefore the balance never became due and payable.

On the counterclaim the fact that Mrs. Gomes occupied the building will not in the circumstances of this case prevent her claiming damages for the work uncompleted and badly done under the contract, and here again there can be no doubt that the contractors did not carry out the requirements of the contract and that their work was most incompetently done.

I agree with the assessment of damages by Spry, J.A. and with the order he proposes.

Sir Daniel Crawshaw JA: I have read the judgment of Spry, J.A., with which I entirely agree. There will be an order in the terms proposed by him.

Appeal allowed.

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J. M. Nazareth, Q.C. and F. R. S. de Souza

For the respondents:

J. K. Winayak & Co., Nairobi

J. K. Winaya